Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-104

CONSOLIDATED RAIL CORPORATION, CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, WILLIAM M. GIBBONS, Trustee of the CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DELAWARE AND HUDSON RAILWAY COMPANY and ILLINOIS CENTRAL GULF RAILROAD COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

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OCTOBER TERM, 1977

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No.

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Consolidated Rail Corporation,
Chicago And North Western Transportation Company,
William M. Gibbons, Trustee Of The
Chicago, Rock Island And Pacific Railroad Company,
Delaware And Hudson Railway Company
And Illinois Central Gulf Railroad Company,
Petitioners,

v.

United States Of America And
Interstate Commerce Commission,
Respondents.

—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

—

Petitioners [1] pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit.

THE OPINIONS BELOW

The report and order of the Interstate Commerce Commission is reported at 350 I.C.C. 11 and is printed in Appendix B, *infra*, p. A5. The opinion of the Court of Appeals is reported at – F.2d. – and is printed in Appendix B, *infra*, p. A26. The order of the Court denying rehearing is printed in Appendix B, *infra*, p. A71.

1. Petitioners are common carriers by railroad. Grocery Manufacturers Of America, Inc. intervened in support of respondents.

JURISDICTION

The judgment of the Court of Appeals was entered on April 1, 1977. A timely petition for rehearing was denied on April 22, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

QUESTIONS PRESENTED

Section 1(14)(a) of the Interstate Commerce Act (49 U.S.C. 1(14)(a)) authorizes the Commission to prescribe the daily rate of freight car hire (per diem) paid by a user railroad to the owner railroad. The section also authorizes the Commission, in order to improve car utilization and supply, to increase the rate of car hire by adding incentive elements, resulting in what is generally referred to as "incentive per diem" or "IPD." The Commission is forbidden to impose IPD unless it first determines that the supply of such type of car is "short" or "inadequate," and that the higher rate of car hire is necessary to promote a number of statutory purposes.

In 1970, the Commission prescribed IPD on plain (XM) boxcars, based upon lengthy and recurring shortages of such equipment. Here, acting upon the request of a major shipper, IPD was imposed upon a newly-developed, specialized (XF) boxcar. The shipper's request was not premised upon any shortage or inadequacy, but on its apprehension that a car owner might reclassify a car from XF to XM simply to earn the inflated incentive per diem rate while the car was in the possession of a user railroad. Because XF cars are normally assigned to the exclusive use of a particular shipper, while XM cars are "free-running," the hypothetical reclassification would eliminate the shipper's ability to control the car in its own

assigned service, and thereafter it would stand in no better position than any other shipper in ordering a boxcar.

In a clear departure from prior norms, the Commission extended IPD to the specially-equipped (XF) car, thereby equalizing the financial reward to the car owner and removing any incentive to reclassify cars from the XF (equipped) to the XM (plain) category. The beneficiary of the Commission's action was the major shipper who retained a preferred status in terms of car supply. The loser was the user railroad which had no control over whether the car was reclassified or not, but which had to accept the car in interchange and pay the higher rental.

The questions presented are:

1. May the Interstate Commerce Commission employ its authority to prescribe "incentive per diem" —railroad freight car rentals exceeding levels which compensate owners for their full costs—not for the statutory purpose of improving car supply and utilization, but rather to assure the continued availability of a fleet of special-purpose cars for the benefit of a single shipper or group of shippers at the disproportionate expense of terminating railroads?

2. May the Interstate Commerce Commission, without explanation, discard in a single case its own standards of proof established and reaffirmed in cases prior to and after the case in issue?

3. May a Court of Appeals, on petition for review of an order of the Interstate Commerce Commission, affirm that order based upon findings which the Commission itself did not make?

STATUTES INVOLVED

The statutes involved are Section 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. 1(14)(a) and Section 10 of the Administrative Procedure Act, 5 U.S.C. 706. They are printed in Appendix A, *infra*.

STATEMENT

This case presents a clear example of the careless regulatory decision-making which has brought the federal regulatory process into its current low repute and provoked cries for regulatory reform or outright deregulation. Petitioners seek certiorari in order to clarify a critical aspect of the Interstate Commerce Commission's authority over financial and operating relationships within the railroad industry, which it has exercised in this case without heed to legislative language, its own contemporaneous precedent, or the economic consequences for a number of the nation's most financially troubled railroads. Legal grounds for certiorari and reversal are set forth exhaustively in Circuit Judge Wright's 39-page dissent to the Court of Appeals' 3½-page decision below. Judge Wright's analysis relies heavily on the history of Congressional and Commission actions in the freight-car-utilization field set forth in this Court's opinions in *United States v. Florida East Coast R. Co.*, 410 U.S. 224 (1973) and *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 743 (1972).

The Interstate Commerce Commission exercises authority under Section 1(14)(a) of the Interstate Commerce Act to prescribe the freight car rental a railroad pays when a car owned by another railroad is on its lines. Ordinarily, these inter-railroad rentals, which are called "per diem" payments, are computed:

> ". . . solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value . . ." (49 U.S.C. § 1(14)(a)).

However, the Commission also has authority to increase such per diem rentals on particular types of cars by "incentive elements" which:

> ". . . provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate" (*id.*).

The power to impose "incentive per diem" was established in 1966 in an attempt to remedy deficiencies in the operation of the national freight car pool, in which cars are interchanged freely among the railroads, and, subject to contrary car service rules, railroads may use cars owned by other roads in substitution for their own. *United States v. Florida East Coast R. Co., supra*, at 232-3; *United States v. Allegheny-Ludlum Steel Corp., supra*, at 745. Briefly, the theory is that while regular "per diem" (compensating all costs of ownership, maintenance and return on investment) might be adequate in normal circumstances, during periods of car shortages caused by pool-induced inefficiencies in car handling, a higher "incentive per diem" might be necessary to correct those inefficiencies—both by providing additional incentive for prompt return of cars to the owner and by paying owners a higher "just and reason-

sonable compensation" when their cars are in short supply and therefore more valuable. Slip Opinion, pp. 21-22 (Wright, dissenting).

The Interstate Commerce Commission first made use of the 1966 amendment in 1970, when it imposed incentive per diem on all free-running plain boxcars, called XM cars. *Incentive Per Diem Charges—1968*, 337 I.C.C. 217 (1970). By 1973, however, it was clear that in spite of the IPD order the national pool of XM boxcars was continuing its pre-1970 decline, and the Commission reopened the proceeding to consider possible modifications. In the course thereof, a major shipper, General Mills, Inc., requested that incentive per diem be extended to cover its assigned XF cars—boxcars equipped with an interior epoxy coating which makes them easy to keep clean and therefore desirable for moving finished food products. The Commission established a separated sub-proceeding in which it granted General Mills' request, and it is this Commission order and the Court of Appeals' affirmance that have led to the present petition for certiorari.

Epoxy-lined XF cars were first developed and placed in service only four years ago, in 1973, and there are approximately 3,000 of them in use today. XF cars are not—and never were—part of the national pool of free-running boxcars, but rather are assigned to particular shippers such as General Mills for their exclusive use. This means that after unloading they must be returned empty to the shipper (Slip Opinion, pp. 23-26) and may not be appropriated by non-owning railroads which "by hook or by crook, arrange to utilize cars owned by other roads" (*United States v. Allegheny-Ludlum Steel, supra*, at 745). Although XF cars are therefore free from the kind of uncontrolled utilization which incentive per diem was intended to correct, General Mills argued that IPD on such

cars was imperative if the cars were to be kept in its own assigned service. Otherwise, railroads owning XF cars might redesignate them XM, thereby removing them from assigned to free-running service and gaining the higher "incentive" rentals from non-owning railroads. No evidence of any kind was introduced by General Mills or any other party supporting this fear, and the only factual information of record showed that the XF car fleet improved both as to supply and utilization throughout the period after 1973 when XM cars alone were subject to incentive per diem. Slip Opinion, p. 12, n. 25.

Nevertheless, the Commission made the statutory finding that the supply of XF cars was inadequate and ordered incentive per diem imposed. The required finding of inadequacy was based on evidence that approximately 750,000 carloads of processed food are shipped annually as compared with the approximately 3,000 XF cars which have been built and placed in service to date. The assumed demand/supply "gap" in these statistics was based on the premise that only XF cars are satisfactory for carrying processed food. But no evidence of record supported this premise or possibly could have: While unlined XM cars, as well as other types of equipment, will become dirty or infested when used to haul unprocessed grains or other products,[2] they can be and commonly are used in transporting processed foods. Indeed, the only testimony presented by General Mills on this point demolishes the Commission's premise altogether: General Mills testified that, apart from its assigned XF cars, it also successfully uses XM and *other* types of cars assigned to its exclusive use. Slip Opinion, Wright, p. 17.

A divided court below affirmed the Commission's order, finding that the imposition of incentive per diem on

2. An assigned XF car, if misused for loading of contaminating cargoes, would suffer the same fate.

assigned XF cars was within the grant of statutory authority under Section 1(14)(a) and supported by substantial evidence. The court acknowledged that the Commission had departed from the standards of proof established in contemporary proceedings, but said this was justified due to "the recent development of the XF classification" Slip Opinion, p. 4.

XF car-utilization procedures have not changed since the date of the Commission's order, since, under the order, they remain in assigned service just as before. However, the annual cost of the order to Conrail and the other petitioning railroads—all of which are primarily terminating railroads on movements of processed food—runs into the millions of dollars.

REASONS FOR GRANTING THE WRIT

I. The Scope of the ICC's Power to Dictate Inter-Railroad Car Payments for the Benefit of Special Interests Needs to Be Determined by This Court.

In this case, the Interstate Commerce Commission has used a statute of narrow and specific purpose in order to, in the words of Judge Wright below, "create a broad taxing power" to transfer revenues among railroads for the benefit of particular shippers. It is one of a number of recent cases where the Commission has begun to use specific amendments to the Interstate Commerce Act to increase, rather than ease, its control over railroad management in ways clearly unintended and unforeseen by Congress. The passive reaction to this jurisdiction overreaching by the majority of the Court of Appeals below indicates that it is appropriate for this Court now to undertake a more critical review.

Section 1(14)(a), quoted in relevant part in the section above, provides that Commission-prescribed per diem rentals are to be based solely on elements of car ownership expense unless the Commission finds that, due to conditions of fleet inadequacy, additional elements should be added to provide reasonable compensation, improve the efficiency of car utilization and encourage car acquisition and maintenance. The Commission's order establishing incentive per diem for XF boxcars was based on considerations having nothing to do with any of these purposes. Rather, the order is based solely on the speculation that it was needed to prevent reclassification of cars from assigned XF to free-running XM to secure higher per diem payments—a speculation which had no support at all on the record and which is, in any event, irrelevant. Incentive per diem, as this Court and the Commission itself

have recognized, is intended to provide railroads with the necessary incentive to get cars back to their owners rather than letting them stand idle or using them for their own purposes, and also to provide car owners with the appropriately increased returns to ownership in times of car scarcity. But neither of these purposes could possibly have been at issue here, as virtually all XF cars are in assigned service and are directly returned empty to assigned shippers such as General Mills. While the Commission made the requisite formal finding of an inadequacy of XF cars, this finding makes sense only if one assumes that no other type of car can be used for transporting processed food, an assumption which is factually incorrect and was explicitly contradicted by General Mills itself.

It seems too obvious for argument that if the Commission could impose incentive per diem simply to encourage acquisition of a certain type of car for a certain commodity and a certain shipper, the Commission could then proceed to expand incentive per diem, car type by car type, to every railroad car in existence. (And even to car types not yet in existence, the supplies of which are *ipso facto* inadequate according to the Commission's reasoning.) But this, precisely, is what the Commission has done here, and it scuttles altogether the purpose and explicit language of Section 1(14)(a).

Similarly, when the Commission uses its incentive per diem authority expressly to discourage an owner from reclassifying the same car from an assigned to a free-running category, it only manipulates the fleet makeup for the special-interest shipper with no reference whatsoever to increased car supply, improved utilization, or the facilities available to the shipping public generally. The Commission has adequate authority to deal with the reclassification or assignment problem under its car service powers in ways that do not cause arbitrary revenue shifts between user

and owner railroads. But without the predicate of actual "inadequacy," it is without authority to impose a tax on blameless railroad users. The latter are under common-carrier obligation to accept loaded XF cars when tendered in interchange, and they are entitled to protection from this Court under 5 U.S.C. 706 when, as here, the Commission abuses its authority.

II. The Lower Court's Departure From the Accepted and Usual Course of Judicial Review Demands the Attention of This Court.

The lower court's departure from the norm and its exercise of judicial in lieu of administrative *expertise* occurs in two instances. In each, the majority undertook to supply its own findings in justification of the Commission's order where the agency made no findings at all.

First, the majority opinion states that:

> "The Commission's finding of a shortage was based on evidence that 750,000 carloads of processed food are shipped annually, requiring a nation-wide fleet of 40-50,000 suitable cars. Since it has been determined that only about 3,000 such cars exist, the Commission found a clear national shortage. IPD was thus imposed with the expectation that this would encourage the acquisition of XF boxcars." Slip Opinion, p. 3.

When no railroad indicated any anticipated increase in XF acquisitions because of IPD, the Commission's "expectation" is at best wishful thinking rather than administrative expertise, and there is no mention whatsoever of the "40-50,000" figure in the evidence of record. It should suffice here to point out that the Commission's opinion simply does not contain the language, the reasoning or the finding referred to by the court. The statement is that of the court alone.

Secondly, it was the court and not the Commission which undertook to explain the agency's departure from prior norms. Slip Opinion, p. 4. The Commission's own requirements for extending IPD to other types of cars were set forth with precision in a decision rendered only months before the one challenged here:

> ". . . we are amenable to an expansion of the incentive per diem program to cars other than general service boxcars if: (1) a record is made showing the car to be in short supply, (2) a record is made showing a reluctance to expeditiously release the car by the terminating or delivering railroad, (3) a record is made demonstrating that additional incentive to purchase the car is needed, and (4) a record is made showing such an extension of the incentive per diem program to be of general benefit." *Incentive Per Diem Charges–1968*, 349 I.C.C. 303, 311 (1975).

These requirements were reiterated in another IPD decision rendered two years *after* the one challenged here. *Incentive Per Diem Charges–Gondolas*, 353 I.C.C. 612, 616 (1977).

These are reasonable requirements and comport fully with the Congress' careful tailoring of the statutory authority in Section 1(14)(a). But in this case the Commission both ignored these requirements–the record contains no evidence whatever, for example, regarding requirements (2) and (3)–and offered no explanation of why it had ignored them. The lower court undertook to fill the gap:

> ". . . it would not have been possible for the Commission to generate such a record due to the recent development of the XF classification. The need to depart is adequately explained by this situation." Slip Opinion, p. 4

In substituting judicial for administrative *expertise*, the court was plainly wrong, both on the merits and as to its proper function. The Commission's "departure," both from the statutory requirements and its own contemporary interpretation of those requirements, had nothing at all to do with the limited time period during which XF cars were in existence; rather, it resulted from the Commission's failure to tie the prescription of incentive per diem to *the need for improved utilization and supply of the car type at issue*. XF cars were developed and placed in service without incentive per diem, and there was no evidence whatever that terminating car users had failed to release cars expeditiously. The lack of evidence of car mishandling was *not* the result of the XF car's recent vintage, but was the inevitable consequence of their use in assigned service rather than as part of the national pool of free-running cars–so that regardless of car hire levels, terminating users must return empty XF cars to assigned shippers. Slip Opinion, Wright (pp. 23-27). This is the essential consideration overlooked by both the Commission and the majority below.

The lower court's error in attempting to rationalize the Commission's aberration has recently been given emphasis by the Commission itself, which has declared that its action in this case was not a "departure" at all! In subsequently declining to extend IPD to equipped gondolas, the Commission observed:

> ". . . we disagree that equipped gondolas are like XF boxcars and thus should be accorded the benefit of the IPD charges. The inclusion of the XF boxcars into the IPD program . . . was not intended as a

> departure from or exception to the rule prohibiting IPD benefitting only a small segment of the shipping public." *Incentive Per Diem Charges–Gondolas, supra,* p. 630.

As matters stand, the lower court has first found and then explained away that which the Commission now says never existed.

The critical point, of course, is that it was the duty of the Commission, not the lower court, to explain *any* "departure." No rules have been more firmly established by this Court than those forbidding a reviewing court from substituting its judgment for that of the administrative agency, *United States v. Allegheny-Ludlum Steel Corp., supra,* at 749, and requiring that the basis for any departure from prior norms be explained by the agency itself. *Sec'y of Agriculture v. United States,* 347 U.S. 645, 653 (1954); *Atchison, T. & S.F. R. Co. v. Wichita Bd. of Trade,* 412 U.S. 800 (1973). The reason for these restrictions was stated concisely in *Labor Board v. Metropolitan Ins. Co.,* 380 U.S. 438, 444 (1965):

> "For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process, for it would propel the court into the domain which Congress has set aside exclusively for the administrative agency."

In this case, the lower court has 'propelled' itself into sanctioning an order of the Commission by supplying the essential findings and explanations which were emphatically matters of agency responsibility. This entry of the judiciary into the province of administrative *expertise* warrants reversal.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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Dated: July 22, 1977

APPENDIX A.

Statutes

Interstate Commerce Act

Section 1(14)(a) [49 U.S.C. 1(14)(a)]

"The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element

or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest."

1(14)(a), P. L. 94-210, February 5, 1976

"It is the intent of Congress to encourage the purchase, acquisition, and efficient utilization of freight cars. In order to carry out such intent, the Commission may, upon complaint of an interested party or upon its own initiative without complaint, and after notice and an opportunity for a hearing establish reasonable rules, regulations and practices with respect to car service by common carriers by railroad subject to this part, including (i) the compensation to be paid for the use of any locomotive, freight car, or other vehicle, (ii) the other terms of any contract, agreement or arrangement for the use of any locomotive or other vehicle not owned by the carrier by which it used (and whether or not owned by another carrier, shipper, or third party) and (iii) the penalties or other sanctions for nonobservance of such rules, regulations or practices. In determining the rates of compensation to be paid for each type of freight car, the Commission shall give consideration to the transportation use of each type of freight car, to the national level of ownership of each such type of freight car, and to other factors

affecting the adequacy of the national freight car supply. Such compensation shall be fixed on the basis of the elements of ownership expense involved in owning and maintaining each such type of freight car, including a fair return on the cost of such type of freight car (giving due consideration to current costs of capital, repairs, materials, parts, and labor). Such compensation may be increased by any incentive element which will, in the judgment of the Commission, provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car if the Commission finds that the supply of such type of freight car is adequate. The Commission may exempt such incentive element from the compensation to be paid by any carrier or group of carriers if the Commission finds that such an exemption is in the national interest.

1(14)(b)

"The Commission shall, within 18 months after the date of enactment of this Act, revise its rules, regulations, and practices with respect to car service, in accordance with the amendment made by subsection (a) of this section."

Administrative Procedure Act

Section 10(e) [5 U.S.C. 706]

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error."

APPENDIX B

Served June 23, 1975

30788

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 252 (SUB NO. 1)

INCENTIVE PER DIEM CHARGES—1968 (XF CARS)

Decided June 13, 1975

Upon notice of proposed rulemaking and order, regulations governing incentive per diem charges, applied pursuant to section 1(14)(a) of the Interstate Commerce Act, as prescribed in 337 I.C.C. 183, 337 I.C.C. 217, 339 I.C.C. 627, 343 I.C.C. 49, and 349 I.C.C. 303, amended to apply on XF boxcars.

W. Donald Boe, Jr., Robert D. Brooks, Emried D. Cole, Jr., John A. Daily, John F. Donelan, R. L. Downing, Alan G. Dustin, Earl E. Eisenhart, Jr., Charles B. Evans, Richard M. Gleason, Richard A. Hollander, Howard W. Jones, H. D. Koontz, A. Alvis Layne, John K. Maser III, John A. Miltenis, C. Harold Peterson, Thomas H. Ploss, Frank G. Procter, James P. Reedy, John S. Walker, and *Frederic L. Wood* for respondents and interested shippers.

Report of the Commission

O'NEAL, *Vice Chairman:*

The current phase of this continuing proceeding was instituted by Notice of Proposed Rulemaking and Order served August 23, 1974, to determine whether the regula-

tions governing incentive per diem (IPD) charges, applied pursuant to section 1(14)(a) of the Interstate Commerce Act,[1] should be amended to include XF boxcars. Specifically, the Notice of Proposed Rulemaking and Order, which was published on August 28, 1974, in Volume 39 of the Federal Register at page 31331, set forth the following proposed amendment to Section 1036.1, Title 49 of the Code of Federal Regulations (CFR), containing a listing of the kinds of boxcars to which the IPD regulations apply: "Section 1036.1 is hereby proposed to be amended by inserting under the headings 'Mechanical designation' and 'Code number,' and at the end of the enumerated categories of boxcars, the listing 'XF—A120, A220, A320, A420.'" All interested parties were given opportunity to file written responses by September 23, 1974.

Background

In the prior reports in this proceeding found at 337 I.C.C. 183, 337 I.C.C. 217, 339 I.C.C. 627, 343 I.C.C. 49,

1. Section 1(14)(a), as pertinent, states as follows:
"• • • In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest.

and most recently 349 I.C.C. 303, we recognized the efficacy of an incentive element increase in the compensation paid by railroads for the use of freight cars owned by other carriers, and we prescribed rules governing the application of IPD to ordinary boxcars. We found essentially that a shortage in boxcars existed and that the application of an incentive element, i.e., a rate of return beyond mere compensation for risk taken, to the regular per diem owned by railroads holding foreign boxcars, would promote efficient utilization and distribution of cars by encouraging the prompt return of such boxcars. By requiring all IPD credit balances to be "earmarked" for the purchase, building, or rebuilding of general service, unequipped boxcars, we felt that we could further alleviate the boxcar shortage by increasing car supply. In our report in this proceeding in 337 I.C.C. 183, 187, we initially determined that this proceeding would be an "open-ended" proceeding which, in light of experience gained under the regulations, would permit the presentation before the Commission of any situation which might require clarification or warrant modification of the incentive rules and charges.

Consequently, during the course of the most recent reopening of this proceeding, the sole purpose of which was to consider six specific issues[2] which were raised on

2. These issues are as follows: (a) whether the funds earmarked for boxcars should be permitted to be drawn down for the acquisition of other types of cars in demand, such as covered hoppers, and whether such modification would increase the number of boxcars available for general use; (b) whether the then-existing test period average (i.e., the number of cars which must be purchased out of a carrier's general funds before the net credit balances resulting from IPD settlements may be drawn down for the purchase of boxcars) should be modified in any respect; (c) whether a specified period should be prescribed within which incentive funds must be expended or committed to the acquisition of general service boxcars; (d) whether carriers which fail to acquire their required complement of such cars, and, consequently, are unable to draw down the incentive funds within a specified period, should be compelled to return the funds collected to the debtor carriers; (e) whether other methods exist which would

petition for modification, suspension, or rescission of our outstanding orders, the Grocery Manufactures of America, Inc. (GMA), and General Mills, Inc. (General Mills), sought to expand the scope of IPD to include application on XF boxcars, used exclusively to transport food products. While General Mills assumed a noncommittal position with respect to the application of IPD per se, i.e., the propriety or wisdom of the IPD program in general, both parties agreed that, if the IPD program were continued, failure to include boxcars suitable for food-quality usage would pose serious problems in the provision of clean, uncontaminated equipment for the movement of foodstuffs and could materially endanger the wholesomeness of our Nation's food supply.

The XF designation was implemented by the railroad industry in 1973 to designate unequipped cars for the transportation of food products in assigned service. The interior of such cars is coated with a white epoxy surface designed to prevent contamination of processed food by sealing the surface of the boxcar's interior walls against dirt, insects, and odor. Prior to the establishment of the XF designation, food shippers sometimes used XP boxcars in the transportation of food and related products. XP cars are used predominantly in the automobile industry. They are equipped, uncoated, high quality boxcars which have at times been coated by food shippers and used in assigned service for the transportation of food and related products.

General Mills alleged that, due to the implementation of the IPD program with respect to general service, unequipped boxcars only, the railroads have withdrawn an increasing number of cars from the XP category and redesignated them XM in order to obtain added IPD revenues. As a result, General Mills contended that it was required to use additional XM boxcars in the transportation of food and food products; that, because these free-running boxcars in general service are used to load bulk feeds, grains, and similar products, which introduce infestation, contamination, and rodent inhabitation into food-quality boxcars, such cars cannot be controlled effectively to preserve the highest possible food quality standards; and that, to counteract the contamination and infestation found in these cars, an increasing amount of chemical pesticides is being introduced into the environment. All these factors, General Mills contended, are contrary to the congressional policy expressed in the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4231, *et seq.*

2. (Cont'd.)

facilitate the use of the accrued IPD funds for the purchase, building, or rebuilding of general service, unequipped boxcars; and (f) whether any group of carriers should be exempt from the payment of IPD.

In an initial decision on further reconsideration, dated July 2, 1974, an Administrative Law Judge denied the requests of GMA and General Mills as beyond the scope of that proceeding, advising the food shippers to look to the carriers for relief rather than to the Commission in the subject proceeding. Out of an awareness of the importance of the issues raised by General Mills and GMA, we instituted the rulemaking proceeding which is the basis of this report.

Responses to the Notice and Order

The majority of the railroad respondents commenting upon the notice and order [3] are opposed to the proposed

3. Those railroad respondents commenting upon the proposal included: Robert W. Meserve, and Benjamin H. Lacy, trustees of the property of the Boston and Maine Corporation; Burlington Northern Inc.; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; The Denver and Rio Grande Western Railroad Company; Thomas F. Patton and Ralph S. Tyler, Jr., trustees of the property of the Erie Lackawanna Railway Company, Debtor; Florida East Coast Railway Company; Grand Trunk Western Railroad Company; Illinois Central Gulf Railroad Company; Louisville and Nashville Railroad Company; Robert W. Blanchette, Richard C. Bond, and John H. McArthur, trustees of the property of the Penn Central Transportation Company, Debtor; Seaboard

modification of section 1036.1. Most of them feel that no shortage has been shown to exist and that the proposed order fails to consider other elements as required under section 1(14)(a). In this connection, several respondents assert that they have not in fact reclassified XP cars and that, in the absence of any demonstrated shortage of either ordinary boxcars or XF cars, the IPD program in general should be eliminated as counterproductive. Other railroads are concerned with the costs of implementing the program, and some, such as the Florida East Coast Railway Company, an inherent IPD debtor, are concerned that the proposal will only aggravate their already substantial IPD debt balance.

The other arguments against the present proposal revolve around two issues, one environmental, the other related to car service. The environmental arguments question our concern over the dangers to the public health and safety allegedly occasioned by the increased use of pesticides in food shipments. It is initially noted that nothing has been introduced in this proceeding to indicate the extent to which pesticides are being used today or the manner in which they can permeate shipments of edible food. Next, it is submitted that the problems with food shipments lie in the cleaning, rather than the supply, of cars and that if boxcars were properly cleaned after use, increased application of pesticides would not be required. Finally, and most importantly, a number of parties contend that the notice and order instituting this proceeding was based upon the National Environmental Policy Act of 1969 (NEPA), whereas invocation of section 1(14)(a) is required in order to institute properly a proceeding involving the IPD program.

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3. (Cont'd.)

Coast Line Railroad Company; Soo Line Railroad Company; Southern Railway Company; and Union Pacific Railroad Company.

Shipper comments in addition to those received from General Mills and GMA were submitted by General Foods Corporation.

The arguments regarding car service stem from the language in the notice and order that "XF boxcars must be utilized in general service and not limited to the exclusive use of any particular shipper." Comments concerning this statement were submitted both by shippers of food and railroads in favor of the proposal, as well as those railroads in opposition. Essentially what is requested by most parties is a clarification of the meanings of the terms "general service" and "exclusive use of any particular shipper." Taken most literally, most of the parties agree, the cited language would encourage the utilization of XF cars in general service in the transportation of unsanitary, contaminating commodities, as well as in the movement of packaged food and other noncontaminating commodities. It is alleged that the incidence of contamination will be much higher, and the need for fumigation and other forms of decontamination much greater, if XF cars are placed in unlimited general service, than if they were permitted to remain in some form of assigned service. Furthermore, several parties add, the prohibition against assignment to the exclusive use of any particular shipper would contradict the provisions of Car Service Directive No. 155 of the Association of American Railroads (AAR), which requires empty cars to be returned to their owners empty, thus giving the car owner control of the car while off line.

Alluding to the Commission's "obvious purpose" of increasing the supply of cars suitable for food-quality shipments, several parties, primarily shippers of food and carriers generally in favor of the proposal, have sought various amendments of the rule which, it is argued, would increase the supply of food-quality boxcars available for use by shippers of food. For example, it has been requested that our order specify that cars be used in general service but limited to food-quality usage (although not limited to the use of any particular shipper); that they be used in general service unless specific assignment will be beneficial to the railroads and to the public; and that they be restricted to

use in general service; but assignable to railroad agents at specific locations to be utilized as part of a dedicated boxcar pool for the transportation of food and other noncontaminated products contained in clean packaging. Additionally, the Grand Trunk Western Railroad Company (Grand Trunk Western), a small line which owns a relatively large proportion of the national supply of XF and XP cars for the use of three local cereal companies, believes that the prohibition against specialized assigned service would totally deplete its fleet. Accordingly, it asks for permission to assign cars, subject to abrogation of this right when the supply increases.

Shippers of food and railroads in support of the proposal believe generally that, as long as some form of assignment in food-quality service is permitted, the supply of food-quality boxcars will be augmented through improved utilization. For the most part they agree that there is a need to increase the fleet of uncontaminated cars for the shipment of foods, and that application of IPD to XF cars, with the aforementioned modifications concerning assignment, would be beneficial to the industry and, more importantly, the general public. General Mills submitted a detailed statement, including much of the same material which was earlier presented in the course of this proceeding. This evidence concerned the supply of XF, XP, and XM boxcars, the increasing use of pesticides, and the need for application of IPD to XF cars to insure the integrity of shipments of food.

Discussion and Conclusions

While the institution of IPD has in general had a beneficial effect on the supply of general purpose boxcars, unquestionably it tends to exacerbate the shortage of the high quality boxcars required to transport efficiently and sanitarily food products for human consumption. By requiring IPD surpluses to be earmarked for the acquisition of unequipped, general purpose boxcars, the Commission

may be fostering the expansion of the general purpose boxcar fleet. At the same time, however, the economic incentive to purchase cars which are subject to IPD may tend to result in reduced acquisitions of other types of cars necessary to meet the needs of commerce. This economic incentive is magnified by the requirement that, with limited exceptions, unspent IPD credit balances cannot be drawn down until a carrier has first purchased, built, or rebuilt, out of general operating funds, the number of cars required under the test period average, plus any arrearages in failing to meet the average in prior years.

The effect of IPD on XF cars is difficult to measure with precision, because our experience with XF cars is limited by the recent 1973 origin of the XF designation. Most up-to-date statistics indicate that there are currently in the neighborhood of 2,495 cars in the XF fleet, all restricted to loading processed packaged food and, under some circumstances, other noncontaminating products, and that there are 29,075 XP cars. (See Universal Machine Listing Equipment Register, published by the AAR.) If we are to encourage the acquisition of new XF cars, whether it be through refurbishing of XM cars or purchase of new cars, it is apparent that we will have to place XF cars on the same footing as XM cars with respect to IPD.

In our report in this proceeding in 337 I.C.C. 183, at 186, we determined that shipper need for the standard boxcar far exceeded the need for any other type of car, and that demand for these cars could not be satisfied from existing sources of equipment for at least half the calendar year. We projected that application of IPD on boxcars during the fall and winter, the periods experiencing the heaviest shortages, would help to alleviate the boxcar shortage by encouraging debtor roads to purchase more cars, return foreign cars more promptly or to pay an incentive charge that would permit the creditor roads to purchase more cars. Subsequently, by order dated March 30, 1973, we decided that the mandate of section 1(14)(a)

would be more adequately fulfilled by extending the application of IPD to a year-round basis. Our action was upheld by a three-judge court for the Eastern District of Pennsylvania in *Ann Arbor Railroad Company v. United States*, 368 F. Supp. 101 (1973), affirmed *per curiam* by the Supreme Court in *Ann Arbor R. Co. v. United States*, 419 U.S. 807 (1974).

Our administration of the IPD program over the past several years has, we believe been an effective tool in improving utilization, in reducing the boxcar shortage, and the shortage today is significantly less severe than it was in 1969, when the IPD regulations, were first implemented. However, while encouraging the growth and improved utilization of the general purpose boxcar fleet, the regulations may have concomitantly stifled increased acquisitions of other types of cars vital to meet the needs of commerce.

The current shortage of XF cars is amply demonstrated by the prevalent use of the so-called class "A" boxcars in transporting shipments of food products.[4] These ordinary boxcars are classified "food quality" by the railroads because they are supposedly sufficiently sanitary for the transportation of edible food products. Unfortunately, certain shortcomings are inherent in the railroad boxcar classification procedures. First, classification often consists of a car inspector's visual inspection of the boxcar. Thus, a car which has transported, for example, grain, must be swept clean and classified as class "A" by an inspector after a visual inspection. However, the car may contain residues of grain, as well as insects, rodents, and other contaminants behind the car lining. These contaminants are not apparent from a mere visual inspection, but they nonetheless pose a serious health hazard to subsequent food shipments if not treated with proper pesti-

4. The railroads in their boxcar classification normally distinguish between class "A" boxcars, suitable for transportation of edible food products, and class "B", "C", and "D" boxcars, used for the transportation of progressively lower grade commodities.

cides or other decontaminants. Second, class "A" is not a controllable car usage category. Therefore, a class "A" car may be used for general purposes to transport contaminating products and may require thorough cleaning and decontamination before it can be adequately sanitary for the transportation of edible food products. As described in the Environmental Threshold Assessment Survey (ETAS) [5] prepared in this proceeding, served May 7, 1975, the decontaminants employed may pose potential safety hazards if improperly applied and may permeate packaged food shipments or contaminate subsequent shipments of unpackaged food. Finally, the designation of class "A" is subjective, and, as such, will vary from railroad to railroad, and even from inspector to inspector. Without any positive, uniform standards, boxcars of inferior quality may be loaded with food shipments, substantially increasing the risk of present and future contamination.

If the supply of XF cars were increased sufficiently to accommodate the majority of the food shipments transported by the railroads, most of the associated health hazards would be significantly alleviated. The epoxy lining in the interior of the XF car minimizes the likelihood of residual contamination after the initial cleaning, counteracting the major incidence of railcar contamination of food products. Furthermore, XF cars are presently restricted to loading processed packaged food and other noncontaminating products enclosed in clean packaging. Thus, the primary source of contamination, i.e., grain and related products and other unsanitary bulk commodities, would be banned from cars used for shipments ultimately destined for human consumption.

5. Comments on the ETAS were invited from any party to this proceeding or any other interested person. No responses were received.

The ETAS concluded that this action would not have a significant effect on the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, *et seq.*

The increased incidence of contamination and the concomitant expanded application of pesticides which are inevitable with the continued use of XM cars in the transportation of food do, we believe, establish the existence of a shortage of XF cars, as contemplated by section 1(14)(a) of the act. It is evident that the function of XF cars cannot, under present car service rules, be adequately performed by other cars available for the transportation of food shipments. As previously described herein and as discussed in greater detail in the ETAS, the health problems attending the use of free-running, general service boxcars in shipments of food and related products are sufficiently severe that the need to promote other more suitable means of transportation cannot be overemphasized. While XP cars have in the past been assigned to food-quality service, they are not furnished with the white epoxy lining so effective in minimizing infestation. In the face of these critical environmental and hygienic hazards, then, and in the absence of any adequate alternative means of transporting shipments of food, the national interest could be irreparably damaged by refusing to extend IPD to XF cars. Cf. *Incentive Per Diem Charges*, 332 I.C.C. 11, 15. In view of this pressing need, we find that IPD should be extended to apply on XF cars.

Our order expanding the application of IPD to XF cars will specify that XF boxcars must be utilized for transporting food, food products, and other noncontaminating commodities in general service. While we would be reluctant to permit assignment to any particular shipper, we will allow assignment of XF cars to specific locations to be utilized as part of a dedicated boxcar pool for the transportation of food and other noncontaminating products enclosed in clean packaging. We believe that these two steps will insure to the greatest degree possible the integrity of food shipments while promoting the availability of XF boxcars where they are needed most. They will also preserve to the railroads full control of their cars and will

promote compliance with AAR Car Service Directive No. 155.

Car Service Directive No. 155 provides regulations governing loading, unloading, and return of XF cars, with the objective of maximizing utilization of these cars in the transportation of food-quality shipments. It prohibits loading of bulk commodities and limits XF cars to use in loading packaged food and other noncontaminating products. It presently requires cars assigned to shippers [6] or pool points to be returned empty to assigned loading points after unloading, and requires unassigned cars to be handled either per owner's instructions or returned empty to the owner or loaded to or via the owner, *the holding road to exercise the option* (emphasis added). Violation subjects an offender to a fine of $100.

We see no need to require the recision of Car Service Directive No. 155, as requested by some of the parties to this proceeding. Contrary to their assertions, with the modification previously specified, an XF car owner will have control of the car while off line. After unloading, cars must be returned empty to assigned loading points, if so assigned, or, if unassigned, handled in accordance with ordinary car service rules. In no instances will an owning road be able to delay return of its cars intentionally in order to generate increased IPD revenues.

We believe that application of our regulations in the manner specified will make the maximum contribution to sound car service practices by improving the utilization, acquisition, and maintenance of the supply of XF cars. By limiting XF cars to food-quality service, we will insure the minimum introduction of infestation into food-quality cars, while, by permitting assignment of cars on a flexible basis, we will, to the maximum extent possible, guarantee the

6. Car Service Directive No. 155 currently embodies a section applying to cars assigned to shippers or pool points. To avoid the incongruity of permitting application of IPD on a car assigned to a particular shipper, we will amend the Directive by the deletion of the word "Shippers" from Section A.

provision of cars where demand is greatest. Increased supply and improved utilization of XF cars will have an immediate beneficial effect on the national freight car supply generally. By minimizing, if not eliminating, the need for XM boxcars in food-quality service, we will free these general service cars for use wherever they are required. Concurrently, general service cars will be held for shorter periods, as the need for the time-consuming process of decontamination will be substantially reduced.

As there are no apparent seasonal variations inherent in the volume of food products shipments, we will require year-round application of IPD to XF cars. The amounts of the incentive charges will be derived in the same manner as those applied to other boxcars subject to IPD. In our report in 337 I.C.C. 183, 187-189, we recognized the need to provide an incentive for the railroads to invest in the national boxcar fleet rather than in nontransportation enterprises. We felt this need could be met by applying the overall rate of return on investment earned by nonregulated, higher risk corporations [7] to the per diem charges assessed under the program. Subsequently, after IPD was extended to apply on a year-round basis, we effectively increased the amount of incentive charges to reflect an 18-percent annual rate of return on investment, in lieu of the overall 12-percent rate of return which had been the original basis of the charges. Charges computed on this basis were found just and reasonable in the *Ann Arbor* case, 368 F. Supp., *supra,* at 113. Of course, the maximum daily charge remains $12.98.

We believe that charges computed in this manner will provide car owners with just and reasonable compensation.

7. We determined that an overall rate of 12 percent per year would be a just and reasonable figure. This overall percentage was achieved by fixing charges which would produce an 18-percent rate of return during the half-year period in which IPD was originally designed to be applicable. By averaging this rate of return with the 6-percent rate earned on ordinary boxcars during the remainder of the year, an overall figure of 12 percent was developed.

The 18-percent rate of return will not actually be realized, since a substantial portion of the existing XF car fleet is used by the owning railroads the majority of the time. Bearing this fact in mind, prescription of charges based on a 12-percent rate may be inadequate to stimulate prompt return and increased acquisition of XF cars. Moreover, as previously stated, it is obvious that XF cars must be placed on the same footing as XM cars with respect to IPD if their inclusion is to be successful. We hope and believe that the application of these higher rates of return will make the purchase of XF cars sufficiently attractive to channel more railroad investment into the national boxcar fleet.

The present regulations governing the test period average which must be met before IPD balances can be drawn down to acquire additional cars require, with the modifications specified in our report in 349 I.C.C. 303, 311-315, that the carrier has built or purchased its 1964-1968 average number of such boxcars and made up any arrearages in having failed to maintain such average for any given year. See Title 49 of the CFR, section 1036.4. Obviously, this requirement is impracticable in the instant situation, as the designation "XF" never existed prior to 1973. Consequently, in the absence of any feasible test period average the only requirement we will impose upon carriers wishing to draw down IPD balances is that they match IPD expenditures through general corporate fund expenditures. This requirement demands only that which is required of any other carrier which is exempted from meeting the test period average, and will encourage at least minimal corporate expenditures in addition to IPD expenditures. Funds now in escrow may be used for acquisition of new XF cars or conversion of XM cars, provided the carriers comply with the specifications currently governing rebuilding, embodied in our report in 343 I.C.C. 49, 58, and further clarified in our report in 349 I.C.C. 303, 325-326. Carriers intending to utilize such funds in escrow for these purposes should notify the Commission's Bureau of Accounts.

General Observations

Contrary to the assertions of certain respondents opposed to our proposed action, the extension of IPD in the manner heretofore specified is based, not on NEPA, but on section 1(14)(a) of the act. However, as noted above, we have complied with NEPA requirements. When we instituted this proceeding we believed, and this record confirms, that there exists a shortage in food-quality boxcars, and that, as a result of this shortage, the quality of our environment was seriously threatened. Section 1(14)(a) of the act requires the Commission, in determining whether an incentive element should be included in the compensation to be paid for the use of any type of freight car, to give consideration to the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. Under the circumstances here present, the needs of commerce are inextricably interwoven with our concern over the environment, and any attempt to consider one without addressing the other would be futile.

Furthermore, the extension of IPD to XF cars will have the salutary effect of encouraging the railroads to expend IPD funds even before the test period average with respect to ordinary boxcars has been met. The problems involved in meeting the test period average were elicited in the *Ann Arbor* case, 368 F. Supp., *supra,* at 113, and we took steps to assist the railroads in handling their individual problems. By requiring only a matching of corporate expenditures, the acquisition of an adequate car supply will be further facilitated.

Ultimate Findings

We find and conclude that the revision of the rules respecting incentive per diem charges on boxcars, as set forth in the appendix hereto, will provide just and reasonable compensation to owners of XF boxcars, contribute to

sound car service practices, including efficient utilization and distribution of cars, and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense.

An appropriate order will be entered.

Commissioners Tuggle and Clapp did not participate.

APPENDIX

Revised rules and regulations

PART 1036—INCENTIVE PER DIEM CHARGES ON BOXCARS

§ 1036.1 *Application.*—Each common carrier by railroad subject to the Interstate Commerce Act shall pay to the owning railroads, including the owning railroads of Canada, the additional per diem charges set forth in § 1036.2 on all boxcars shown below,

Mechanical designation	Code number
XM	B100-109, B200-209, B300-309
XMI	B110-119, B210-219, B310-319
XMIH	B120-129, B220-229, B320-329
XF	A120, A220, A320, A420

while in the possession of nonowning railroads and subject to per diem rules. These charges are in addition to all other per diem charges currently in effect or prescribed. Mexican-owned cars are exempt from the operation of these rules. The rules of this part shall apply regardless of whether the foregoing boxcars are in intrastate, interstate, or foreign commerce.

§ 1036.4 *Use of funds.*—The net credit balances resulting from incentive per diem settlements, which are earmarked in accordance with § 1036.3, may be drawn down in whole or in part at any time by the carrier to build, lease equivalent of purchase, or purchase, in whole or in part,

new unequipped boxcars for general service described in § 1036.1, *provided,* the carrier has in the same calendar year built, leased, or purchased its 1964-68 average acquisitions of such boxcars and made up an arrearage in having failed to maintain such average each year this order is in effect. Earmarked funds may also be used in whole or in part to lease any number of new unequipped boxcars for general service described in § 1036.1, in which the carrier is not acquiring an equity interest, *provided,* the carrier has in the same calendar year leased its 1964-68 average number of such boxcars and made up any arrearage in having failed to maintain such average each year the order is in effect. Net balances on Canadian-owned cars may be drawn down without regard to prior acquisitions, but where the designee is a class I United States carrier such drawdowns shall not affect that carrier's accumulation of arrearages. However, upon application, including a showing that all parties to the proceeding herein have been notified by the carrier of such application and a showing of good cause why any carrier is unable to draw down in whole or in part the net credit balance resulting from incentive per diem settlements because it cannot comply with the above test period average requirement of having in the same calendar year built, rebuilt, leased, or purchased its 1964-68 average number of such boxcars and made up any arrearage in having failed to maintain such average each year this order is in effect, the Commission may, in its discretion, after consideration of all views regarding the application, modify the test period average to the extent consistent with the public interest and the national transportation policy. Such modification, as a minimum, shall require that a carrier match the earmarked funds it will use with an equal amount of its own funds. Similarly, a carrier using earmarked funds, in whole or in part, to build, rebuild, lease, or purchase general service, unequipped boxcars of the XF designation, shall only be required, as a minimum, to match the earmarked funds it will use to purchase XF boxcars with an equal amount of its own funds. Earmarked funds must be put to use within 18 months after the end of the calendar year in which the funds are collected and result in a net credit balance for the building, rebuilding, leasing, or purchasing of general service, unequipped boxcars described in § 1036.1 for addition to such carrier's or designee's fleet in accordance with this part. Upon a showing of good cause an application, including a showing that the parties to the proceeding herein have been notified by the carrier of such application, may be made to the Commission for waiver of the said 18-month period, which may, in the Commission's discretion, be granted after consideration of all views regarding the application. If the earmarked funds are not used within the 18-month period, they may be voluntarily surrendered to Rail Box whose establishment and operation was approved in Finance Docket No. 27589, *American Rail Box Car Company and Trailer Train Company, et al.—For Approval of the Pooling of Car Service with Respect to Box Cars.* If the carrier fails within the stated period to put to use collected earmarked funds which result in a net credit balance, has not obtained relief from that requirement, and has not surrendered such funds to Rail Box, the Commission will investigate the matter to determine what, if any, corrective action is warranted. Appropriate corrective action would include section 16(12) remedies among others. Carriers may make temporary investments of unexpended funds in Government bonds or other liquid securities. Such securities must be readily convertible to cash so that funds remain available for boxcar purchases. Interest earned must become part of the earmarked fund. As used in this section, "build," "rebuild," "lease," or "purchase" refer to a commitment to build, rebuild, lease, or purchase which results in the acquisition of a car on line ready for use within 10 months from the date of commitment, except that in extraordinary cases beyond the control of the carrier or the car supplier, a car that is delivered after 10 months from the date of commitment may qualify if approved by the Bureau of Accounts of this Commission.

TITLE 49 - TRANSPORTATION
CHAPTER X - INTERSTATE COMMERCE COMMISSION
SUBCHAPTER A - GENERAL RULES AND REGULATIONS
PART 1036 - INCENTIVE PER DIEM CHARGES ON BOXCARS

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 13th day of June 1975.

EX PARTE NO. 252 (SUB-NO. 1)

INCENTIVE PER DIEM CHARGES—1968 (XF CARS)

Upon consideration of the record in the above-captioned proceeding including the Notice of Proposed Rulemaking and Order, served August 23, 1974, and the comments received from several railroad respondents and interested shippers; and

It appearing, That the revision of the rules respecting incentive per diem charges on boxcars, as set forth in the appendix of our report herein, will provide just and reasonable compensation to owners of XF boxcars, contribute to sound car service practices, including efficient utilization and distribution of cars, and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense;

Wherefore, and good cause appearing therefor:

It is ordered, That sections 1036.1 and 1036.4 of Subchapter A, Chapter X, Title 49 of the Code of Federal Regulations be, and they are hereby, amended to read as set forth in the appendix of our report herein.

It is further ordered, That XF boxcars must be utilized in the transportation of food, food products, and other noncontaminating commodities in general service. However, to improve utilization, XF boxcars may be assigned to specific locations to be utilized as part of a dedicated boxcar pool for the transportation of food and other noncontaminating products enclosed in clean packaging.

It is further ordered, That a copy of this order shall be delivered to the Director, Office of the Federal Register, for publication therein.

And it is further ordered, That this order shall become effective 35 days from the date of service and continue in full force and effect until the further order of the Commission.

This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

By the Commission.

JOSEPH M. HARRINGTON,
Acting Secretary.

(SEAL)

SERVICE DATE
July 18, 1975

Order

—

INTERSTATE COMMERCE COMMISSION

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EX PARTE NO. 252 (Sub-No. 1)
INCENTIVE PER DIEM CHARGES–1968 (XF CARS)

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IN THE MATTER OF MODIFICATION OF COMPLIANCE DATE

PRESENT: George M. Stafford, Chairman, to whom this matter has been assigned for action thereon.

It appearing, That by order served June 23, 1975, the Commission prescribed certain incentive per diem charges on XF boxcars to become effective 35 days from the date of service, or July 28, 1975;

And it further appearing, That because per diem accounts are kept and settlements made on a monthly basis, any changes in the method of computing per diem charges effected during the course of a month cause unwarranted complications and burdensome accounting expenses; wherefore,

It is ordered, That the date for compliance with said order served June 23, 1975, be, and it is hereby, changed to August 1, 1975, with no other changes in the terms of said order.

Dated at Washington, D.C. on the 16th day of July 1975.

By the Commission, Chairman Stafford.

ROBERT L. OSWALD
Secretary

(SEAL)

SERVICE DATE
July 22, 1975

INTERSTATE COMMERCE COMMISSION
Washington, D.C. 20423

—

EX PARTE NO. 252 (SUB. NO. 1)
INCENTIVE PER DIEM CHARGES–1968 (XF CARS)

—

July 22,1975

NOTICE TO THE PARTIES:

The report of the Commission served in this matter on June 23, 1975, printed at 350 I.C.C. 11, contained certain inadvertent errors. Please make the following changes in your copies:

(1) Page 20, third line of footnote 6, change "we will amend the Directive" to "we will require amendment of the Directive."

(2) Page 23, fourth line from the bottom, change "an arrearage" to "any arrearage."

(3) Page 24, line six, insert after the word "arrearages" the phrase "resulting from prior failure to build, rebuild, lease, or purchase its 1964-1968 arrearages."

(4) Page 24, line 10, change "requirement" to "requirements."

These changes will be made in the bound volume.

ROBERT L. OSWALD.
Secretary

SERVICE DATE
July 22, 1975

Order

—

INTERSTATE COMMERCE COMMISSION
EX PARTE NO. 252 (Sub-No. 1)
INCENTIVE PER DIEM CHARGES—1968 (XF CARS)

—

IN THE MATTER OF A REQUEST FOR EXTENSION OF THE TIME FOR FILING PETITIONS FOR RECONSIDERATION AND FOR A STAY OF THE EFFECTIVE DATE OF THE ORDER IN THIS PROCEEDING

PRESENT: George M. Stafford, Chairman, to whom this matter has been assigned for action thereon.

Upon consideration of the record in the above-entitled proceeding, including the order of the Commission entered June 13, 1975; the letter of Penn Central Transportation Company, filed July 14, 1975, requesting an extension of the time for filing petitions for reconsideration and a stay of the effective date of the said order; and the reply of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, filed July 18, 1975; and

It appearing, That all parties to this proceeding have had ample opportunity to review all comments submitted;

It further appearing, That, in view of our order entered May 12, 1975, staying the effectiveness of the order entered March 31, 1975, in *Incentive Per Diem Charges—1968*, 349 I.C.C. 303, 333-334, a stay in the effectiveness of the order entered in this proceeding on June 13, 1975, appears warranted;

Wherefore, and good cause appearing therefor:

It is ordered, That the request for an extension of the time for filing petitions for reconsideration be, and it is hereby, denied.

It is further ordered, That the effective date of the order entered in this proceeding on June 13, 1975, be, and it is hereby, stayed pending further order of the Commission.

By the Commission, Chairman Stafford.

Dated at Washington, D.C., on the 22nd day of July, 1975.

ROBERT L. OSWALD
Secretary

SERVICE DATE
September 23, 1975

Order

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At a Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 18th day of September, 1975.

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Ex Parte No. 252 (Sub-No. 1)

INCENTIVE PER DIEM CHARGES—1968 (XF CARS)

—

Upon consideration of the record in the above-entitled proceeding, including the separate petitions, filed July 24, 1975, by Robert W. Blanchette, Richard C. Bond, and John H. McArthur, Trustees of the Property of Penn Central Transportation Company, Debtor, and by William M. Gibbons, Trustee of the Property of Chicago, Rock Island and Pacific Railroad Company, Debtor, for reconsideration of the order entered in this proceeding on June 13, 1975; and the replies of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, filed August 8, 1975, Chicago and North Western Transportation Company, filed August 11, 1975, and General Mills, Inc., and Grocery Manufacturers of America Inc., filed August 12, 1975; and

It appearing, That there is presently a shortage of XF boxcars, and that this shortage will be significantly alleviated if the incentive per diem program is extended, as previously ordered, to include XF boxcars;

It further appearing, That the 18 percent rate of return reflected in the level of incentive per diem charges applied on an annual basis will provide just and reasonable

compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense, see *Ann Arbor Railroad Company v. United States,* 368 F. Supp. 101 (1973), affirmed *per curiam, Ann Arbor R. Co. v. United States,* 419 U.S. 807 (1974).

Wherefore, and good cause appearing therefor:

It is ordered, That the petitions for reconsideration be, and they are hereby, denied.

It is further ordered, That the stay of our order entered in this proceeding on June 13, 1975, effected by order entered July 22, 1975, be, and it is hereby, vacated.

By the Commission.

ROBERT L. OSWALD
Secretary

(SEAL)

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2089

CONSOLIDATED RAIL CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

GROCERY MANUFACTURERS OF AMERICA, INC.
ILLINOIS CENTRAL GULF RAILROAD COMPANY
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD CO.
FLORIDA EAST COAST RAILWAY COMPANY
CHICAGO AND NORTH WESTERN TRANSPORTATION CO.,
ET AL., INTERVENORS

Petition for Review of an order of the
Interstate Commerce Commission

Argued December 10, 1976

Decided April 1, 1977

(Judgment entered this date)

John A. Daily, with whom *Leo C. Franey* was on the brief, for petitioners and intervening railroads.

Lloyd John Osborn, Attorney, Department of Justice, with whom *Barry Grossman*, Attorney, Department of Justice was on the brief, for respondent United States of America.

Frederic L. Wood, with whom *John F. Donelan* and *John M. Cleary* were on the brief, for intervenor.

Arthur J. Cerra, General Counsel Interstate Commerce Commission and *Charles H. White, Jr.*, Associate General Counsel Interstate Commerce Commission were on the brief for respondent Interstate Commerce Commission.

Leo C. Franey and *John A. Daily* entered appearances for the following intervenors, Illinois Central Gulf Railroad Company, Chicago Rock Island, et al and the Florida East Coast Railway Company, Chicago and North Western Transportation Company and Consolidated Rail Corporation.

Before: WRIGHT and ROBB, *Circuit Judges*, and GESELL,* *United States District Judge*, United States District Court for the District of Columbia.

Opinion for the Court filed by *District Judge* GESELL.

Dissenting Opinion filed by *Circuit Judge* WRIGHT.

GESELL, *District Judge:* In a special rulemaking proceeding, the Interstate Commerce Commission has determined that there exists a national shortage of epoxy-lined ("XF") boxcars and has required railroads using another line's XF cars to make incentive per diem ("IPD") payments to their owners.[1] Petitioner, Consolidated Rail Corp ("Conrail"), asserts that there is not sufficient evidence in the record to support the shortage finding, which is a prerequisite to the imposition of the additional, incen-

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

1. *Incentive Per Diem Charges-1968* (XF Cars), 350 ICC 11 (1975).

tive, payments. 49 U.S.C. § 1(14)(a). We affirm the Commission.[2]

According to the Commission, the transportation of processed foods in ordinary boxcars presents serious risks of contamination. Ordinary boxcars ("XM") are often infested with insects and rodents from the cargoes they carry. Processed food at the present time is carried predominantly in "class A" XM boxcars, which are ordinary cars that have been cleaned and inspected. The Commission has determined that these sanitizing procedures are insufficient. The visual inspection carried out for class A designation cannot detect any infestations between car walls, and the quality of such inspections varies. Further, it is possible for non-visible contaminants to later be introduced into the car. Thus, the Commission found that only the XF boxcars are sufficiently sanitary for the transportation of processed food, since the white epoxy lining prevents contaminants between the car walls from reaching the food.

The Commission's finding of a shortage was based on evidence that 750,000 carloads of processed food are shipped annually, requiring a nation-wide fleet of 40,000-50,000 suitable cars. Since it has determined that only about 3,000 such cars exist, the Commission found a clear national shortage. IPD was thus imposed with the expectation that this would encourage the acquisition of XF boxcars.

Petitioner contends that there is no evidence of an XF boxcar shortage because there was no evidence that any processed food shipper had requested an XF car and not received one. It also claims that the Commission did not meet its own previously established criteria for the imposition of IPD.

2. We find on the record substantial evidence to support the Commission's findings and do not reach the issue whether a lesser evidentiary showing would suffice. *See* Judge Wright's opinion at p. A38, n.3 *infra*.

Conrail assumes that there can be no finding of boxcar shortage under the statute unless there is a record of shipper complaints. However, in determining the existence of a shortage the Commission may certainly consider the public interest as well as the interests of shippers. IPD may be imposed to "encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce . . . ." 49 U.S.C. § 1(14)(a). We cannot define the needs of commerce so narrowly as to exclude the need of consumers for uncontaminated, infestation-free food.[3] There certainly is sufficient evidence on the record to support the Commission's determination that the public's needs are best served by the use of XF cars.[4]

It is clear that, as petitioner asserts, the Commission did not compile as elaborate a statistical record in the XF boxcar proceeding as it did in prior proceedings.[5] But as Judge Wright notes,[6] it would not have been possible for the Commission to generate such a record due to the recent development of the XF classification. The need to depart from previous procedures is adequately explained by this situation. *See, e.g., Greyhound Corp. v. ICC*, (D.C. Cir. No. 75-2062, Jan. 21, 1977) (slip op. 3-4).

The dissent, however, after an exhaustive examination of the legislative history of this statute, concludes

3. We also note that the Commission may establish car service rules, after hearings, on its own initiative as well as after a complaint. 49 U.S.C. § 1(14)(a).

4. That the result may also be achieved, as the dissent suggests, by alterations in other car service rules is beside the point. Those determinations are left to the Commission.

5. *See Incentive Per Diem Charges-Gondolas* 40 Fed. Reg. 44851 (1975); *Incentive Per Diem Charges*-1968, 349 ICC 303 (1975).

6. Pp. A49-A50 n.26 ¶ 2 *infra*.

that IPD can be imposed only where boxcar shortages are caused by the tendency of some railroads to hold cars owned by other lines. It says, in essence, that this section of the statute was aimed only at inefficient car utilization practices. However, the statutory delegation of power goes far beyond this limited field:

> It is the intent of Congress to encourage the purchase, acquisition and efficient utilization of freight cars. * * * In determining the rates of compensation to be paid for each type of freight car, the Commission shall give consideration to the transportation use of each type of freight car, to the national level of ownership of each such type of freight car, and to other factors affecting the adequacy of the national freight car supply. * * * Such compensation may be increased by any incentive element which will . . . provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce. . . . 49 U.S.C. § 1(14)(a).[7]

We do not think the Court should rewrite this broad delegation by reference to the legislative history. It is too clear from the statute on its face that inefficient car utilization and distribution is but one of the permissible grounds for the imposition of incentive payments.

The Commission here has acted within its grant of statutory authority, and with substantial evidence to support its actions. The Commission is affirmed.

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7. The statute currently reads as quoted, having been amended by § 212(a) of the Railroad Revitalization and Regulatory Reform Act of 1976 (P.L. 94-21, Feb. 5, 1976). See Judge Wright's opinion p. A40 n.6 for the text at the time the ICC decision in this case was made.

WRIGHT, *Circuit Judge, dissenting:* This case has been argued by the Interstate Commerce Commission and the Justice Department as though the health of the American public would be gravely affected by its outcome. Were this true, I would find it difficult to lodge a dissent. But in fact the health of the nation is not at stake here because no matter how this case is decided the Commission will have ample power to create a fleet of sanitary freight cars, if indeed such a fleet is needed.[1] What is at issue here is the proper interpretation of a sliver of the Commission's overall regulatory authority,[2] Specifically, what must be decided today is whether there is a need for a fleet of white, epoxy-lined boxcars and, if so, whether the cost

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1. Imposition of incentive per diem is by no means the only regulatory approach open to the Commission. It can order railroads which serve food shippers to provide the necessary XF cars. *See Illinois Terminal R. Co. v. United States*, 541 F.2d 201, 206 & n.7 (8th Cir. 1976). In some circumstances, it can condition tariff increases on earmarking of additional revenues for purchase of sanitary equipment. *See United States v. Chesapeake & Ohio R. Co.*, 426 U.S. 500 (1976). Finally, it can change car service rules to prevent loading of contaminants into cars otherwise suitable for food transportation. *See* 49 U.S.C. § 1(14)(a) (1970), *as amended by* Pub.L.No. 94-210, § 212(a), 90 Stat. 46-47 (1976). The only course which it may not adopt is to act without authority and without a proper record, no matter how indisputably beneficial its goals may be. *See Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976).

2. The majority's characterization of the incentive per diem statute as a "broad delegation," majority op. at A36, is misplaced. While the language of the incentive per diem provisions may be broad, its sweep must surely be tempered by the rather narrow office of the car service provisions in the overall scheme of the Interstate Commerce Act. Moreover, there is no evidence in the legislative history of the incentive per diem provisions which would indicate that Congress intended to grant a sweeping authority. Indeed, the House Report accompanying the bill which became the amending legislation specifically states that there was no evidence that the incentive per diem scheme would even work. *See* H.R. REP. No. 1183, 89th Cong., 1st Sess. 2-3 (1965). *See also* H.R. REP. No. 1384, 92d Cong., 2d Sess. 20 (1972) ("incentive per diem as presently structured is not working. It is neither an effective incentive to return cars nor to buy new ones.").

of creating this fleet should be borne in part by railroads which terminate food shipments. By its imposition of incentive per diem ("IPD") on XF boxcars, the Commission has decided both these issues and has opted for an increased car fleet and for putting much of the burden of paying for this fleet on terminating railroads, even though this group is predominantly made up of bankrupt eastern railroads which now comprise the Government-supported Conrail system.

While the Commission's action might be affirmed on a proper record, I do not agree with the majority that the record we have been presented in this case is satisfactory.[3] My objections are twofold. First, unlike the majority, I cannot conclude that the XF car is the only type of car suitable for the sanitary transportation of food. Therefore, although the record clearly supports the need for some 40,000 to 50,000 sanitary vehicles, I conclude that it does not support the need for equal numbers of

3. The proper standard of review of the record in a proceeding such as this is a matter of some dispute. In *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972), the Supreme Court appeared to require substantial evidence on the record as a whole. *See* 406 U.S. at 753. One year later, however, the Court ruled in *United States v. Florida East Coast R. Co.*, 410 U.S. 224 (1973), that the "hearing" requirement was not the full hearing envisioned for adjudications under the Administrative Procedure Act, but could generally be satisfied by procedures required for rulemaking. Since the substantial evidence test does not, under the Administrative Procedure Act, apply to the latter procedures, *see* 5 U.S.C. § 706(2)(E) (1970), it is unclear where the matter stands today. On remand in *Florida East Coast*, the three-judge District Court concluded that substantial evidence was still required. *See Florida East Coast R. Co. v. United States*, 368 F.Supp. 1009, 1014-1015 (M.D. Fla. 1973) (three-judge court), *aff'd*, 417 U.S. 901 (1974). A contrary view was apparently taken by another three-judge District Court in *Ann Arbor R. Co. v. United States*, 368 F.Supp. 101, 112 (E.D. Pa. 1973), *aff'd per curiam*, 419 U.S. 807 (1974). Both District Court cases have been affirmed by the Supreme Court. Because I find either that the record is devoid of any evidence to support the Commission or that the evidence adduced indicates that the Commission has abused its discretion, I do not reach the scope of review issue.

XF cars. My principal disagreement with the majority, however, is over the definition of the shortage finding which the Commission must make before it can impose incentive per diem.[4] With all due respect, I do not think the meaning of the statutory language is "plain," but even if it is, the Supreme Court has recently reminded us: "'When an aid to construction of the meaning of words, as used in a statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear * * *.'" *Train v. Colorado Public Interest Research Corp, Inc.*, 426 U.S. 1, 10 (1976), *quoting United States v. American Trucking Ass'ns*, 310 U.S. 534, 543-544 (1940).[5] Once the history of the incentive per diem provisions is examined, the meaning of the statute becomes relatively clear, but in my judgment that meaning is rather different from that accepted by the majority. For this reason, I respectfully dissent.

I. Background

In order to understand the incentive per diem scheme authorized by Section 1(14)(a) of the Interstate Com-

4. "The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate * * *." 49 U.S.C. § 1(14)(a) (1970).

5. If anything is plain, it is the error of the Commission's interpretation of its authority under § 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. § 1(14)(a). Even the Commission's counsel in brief in this very case appears to agree that § 1(14)(a) is intended to deal with the ills of the national car-pool system. *See* br. of ICC at 1-6. To be sure, Commission counsel has not carried the logic of this position through to its end: that this purpose requires a record which shows the ills of the national car-pool system to be an aggravating factor in shortages of cars upon which IPD is imposed. However, in other proceedings, which bracket the rulemaking reviewed here, the Commission has itself recognized that evidence of such aggravating factors is required before IPD can properly be imposed. *See* text at notes 62 to 63 *infra*. I argue for no more.

merce Act,[6] it is necessary to consider in some detail railroad practices governing interline shipments of freight. In the early days of railroading, freight was physically transferred between the cars of connecting railroads whenever delivery was required at a destination not served by the originating road. By agreement among the railroads, this custom was superseded by the practice of interchang-

6. At the time of the Commission's decision in this case, this section read as follows:

> (a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest.

49 U.S.C. § 1(14)(a) (1970). This section was amended in 1976, Rail Reorganization Act Amendments of 1976, Pub. L. No. 94-210, § 212(a), 90 STAT. 46-47 (1976). The present text of this section is set out in the majority opinion at page 5. Except as noted in Part IV *infra*, the 1976 amendment has no bearing on this case.

ing loaded cars from the originating line to the lines of various connecting carriers without disturbing the car's lading. With the passage of the Interstate Commerce Act, connecting roads became obliged to accept cars from other roads whenever a through route had been established.[7]

The tariff paid by a shipper for a multi-line haul is divided among the carriers who participate in a car's movement. The expense associated with use of the freight car is similarly allocated among the participants through the mechanism of "per diem" payments made by each non-owning participant to the owning line.[8] The amount of the per diem payment is intended to approximate the cost a non-owning participant would have incurred if the freight had been shipped over its lines in one of its own cars.[9] As a result of these transfer payments among the participating roads, the net revenue each participant receives approaches what it would have been had freight been physically transferred from car to car at junction points.

Once unloaded, further movement of a car in interchange service is controlled by a series of car service rules, which have traditionally been promulgated by the Association of American Railroads but some of which are now established by the Commission.[10] In general, a connecting road is under an obligation to load an unowned ("foreign") car before one of its own if a shipment is available which

7. *See generally Chicago, B. & Q. R. Co. v. New York, S. & W. R.R.*, 332 ICC 176, 183-185 (1968) (hereinafter *Per Diem Report*), *aff'd, sub nom. Union Pacific R. Co. v. United States*, 300 F.Supp. 318 (D. Neb.) (three-judge court), *aff'd, sub nom. Boston & Maine R.R. v. United States*, 396 U.S. 27 (1969).

8. Per diem payments are made to the owning line even if it does not participate in a car's interline movement.

9. *See Per Diem Report, supra* note 7, 332 ICC at 186.

10. Section 1(14)(a) gives the Commission authority to establish reasonable rules affecting car service. *See* note 6 *supra*. This authority has recently been exercised to promulgate rules governing the return of cars. *See* 49 C.F.R. §§ 1033.0-1033.19 (1976); *United States v. Allegheny-Ludlum Steel Corp., supra* note 3.

would take the car in the direction of its owner.[11] If no shipment is available, the car can be returned empty. Per diem is assessed, apparently with limited exceptions, on each day that a car is off its owner's lines, regardless of whether a non-owning line is carrying out its statutory obligation to terminate a through shipment, is using the car to meet the needs of its shippers, or is simply allowing the car to stand idle.[12]

As a result of the interchange, per diem, and car service rules, freight cars have in effect been put into a national pool upon which any road is free to draw (and, indeed, may be obligated to draw) [13] to meet the needs of its shippers. The car-pool system, by removing any need to shift freight from car to car at junction points and by minimizing the number of unloaded car movements, has led at least in theory to a very efficient use of rolling stock.[14] In practice, however, the system has been flawed and, in the Commission's longstanding view, has contributed to nationwide shortages of freight cars. In the words of the Supreme Court:

> The Commission concluded that one of the principal factors causing [the] inadequate supply of freight cars was the operation of the national car-pool system. In practice this system resulted in freight cars being on lines other than those of the owning road for long periods of time, since the rules providing for the return of unloaded freight cars in the direction of the lines of the owning road were observed more often than not in the breach. Since the owning road was deprived of the use of its own freight cars for extended

11. *See Hearings on S. 179 and S. 1098 Before the Freight Car Storage Subcommittee, Committee on Commerce,* 89th Cong., 1st Sess. 12 (1965) (statement of Charles A. Webb, ICC Chairman).

12. *See* note 17 *infra.*

13. *See* text at note 11 *supra.*

14. *See Hearings, supra* note 11, at 33 (statement of ICC Chairman Webb).

> periods of time, the Commission found, there was very little incentive for it to acquire new freight cars. In addition, since a road which owned a supply of freight cars inadequate to serve its own on-line shippers could generally, by hook or by crook, arrange to utilize cars owned by other roads, the national car-pool system significantly reduced the normal incentive for a railroad to acquire sufficient equipment to serve its customers.

United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 745 (1972); *see Increased Per Diem Charge on Freight Cars,* 268 ICC 659, 670 (1947).

The Commission first attempted to use an increased per diem charge as a regulatory tool to correct the car shortage problem in 1947. *See generally Increased Per Diem Charge on Freight Cars, supra.* At that time, the Commission found that connecting lines were holding cars unloaded after interchange service for what were in its view unjustifiably long periods of time.[15] By penalizing the holding of cars through an increase in the per diem charge from $1.25 to $2.00, the Commission hoped to spur prompt car movement in an effort to decrease shortages by increasing the number of revenue trips a single car could make in any given time period.[16] The $2.00 penalty per diem was short-lived, however. In *Palmer v. United States,* 75 F. Supp. 63 (D. D.C. 1947) (three-judge court), the order establishing the new rate was set aside on three grounds. First, it exceeded the Commission's authority under Section 1(14)(a) as it was then written. *Id.* at 67. Second, there was no factual evidence that the increase in per diem would increase car utilization during periods of shortage. *Id.* at 70-71. Finally, increased per diem,

15. *Increased Per Diem Charge on Freight Cars,* 268 ICC 659, 662-663 (1947), *vacated, Palmer v. United States,* 75 F.Supp 63 (D. D.C. 1947) (three-judge court).

16. *See id.* at 661, 674.

because it applied without regard to the use being made of a foreign car, was a tool so unrelated to the specific problems to be rectified that its use as a regulatory device raised serious questions of irrationality. *Id.* at 68.[17]

17. The legislative history of the 1966 amendment to § 1(14)(a) reveals that the difficulties with the use of incentive per diem as a tool to enhance car utilization and ownership still remain. For this reason, it is useful to consider *Palmer's* succinct statement of the problem:

> [T]he per diem charge applies every day a foreign car is on a railroad. It applies whether the car is moving as expeditiously as possible, or is standing still; whether it is in the hands of a consignee for unloading, of a shipper for loading, or is under control of the railroad; whether it is awaiting bottoms for export or is being held by the railroad for expected freight. • • •
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> • • • •
>
> • • • [P]er diem • • • has no relation to avoidable delay or to inefficiency. It is payable for every day a foreign car is on the line. • • • The per diem charge, in so far as it penalizes use and non-use, efficient and inefficient use, unavoidable and avoidable delays, alike. It would be deemed arbitrary as a regulatory measure under the established rules of law.
>
> But the decisive consideration is the essential nature of the thing which is proposed to be done here. The car situation involves conflicting economic interests of considerable moment. There is the conflict between the great trunk lines, which are organized and able to own large numbers of cars, and the smaller and shortline roads, unable or unequipped to own many cars. • • • There is also the conflict between a car owner's interests in restricting its cars to its own lines for its own purposes, and the general interest of the nation in through traffic, with its necessary free interchange of cars. There is the conflict between the economic waste of moving large numbers of empty cars from the unloading areas back to the proprietary lines at certain periods of the year, and the economic efficiency of using unloaded foreign cars for the immediate movement of freight awaiting shipment at the points of unloading. The Commission has insisted that the extensive movement of empty cars is an economic waste to be avoided.
>
> The Commission does not propose by the pending order to solve these problems by regulations directly addressed to them, but actually the order cuts across all these complex difficulties. If the order results in the prompt return of emptied foreign cars to the owners, regardless of available

Shortly after *Palmer* the Commission sought enactment of amending legislation that would give it authority to impose per diem above levels needed for fair compensation as a regulatory measure intended to enhance car utilization in times of shortage.[18] Rather than proposing to amend Section 1(14)(a), however, the Commission sought legislation to amend Section 1(15) [19] of the Act, a section allowing the Commission to correct short-term emergency conditions on the nation's railroads. Beginning with its Annual Report for 1957, the Commission proposed to amend Section 1(14)(a) as an alternative to Section 1(15). Either measure would apparently have met the Commission's primary requirement of an incentive for rapid release of foreign cars. *See* ICC, SEVENTY-FIRST ANNUAL REPORT 137 (1957). In addition, the amendment to Section 1(14)(a) was thought to have a beneficial effect on car ownership since it would include as an element of per diem "the earning power or the value of the use of the vehicle which is lost by the owner when used or appropriated by other carriers [thereby eliminating] the owner's loss [and] the user's gain • • •." *Id.* Although legislation had been introduced in Congress in many of the years since the *Palmer* decision, it was not until 1959 that a bill was favorably reported out of committee. That bill [20] was

17. (Cont'd.)

> freight in that direction, it will decide the economic balance between movement of empties and the movement of freight in favor of the former. If the order does not cause hiring roads to release the cars, it will merely transfer tremendous sums of money from non-owners to owners, making the economic status of many non-owners difficult, if not unbearable. • • •

Palmer v. United States, supra note 15, 75 F.Supp. at 67, 68-69.

18. *See* ICC, SIXTY-FOURTH ANNUAL REPORT 128 (1950). The Commission's legislative recommendation was repeated in every Annual Report through 1966.

19. 49 U.S.C. § 1(15) (1970).

20. S. 1789, 86th Cong., 1st Sess., *printed in* S. REP. No. 452, 86th Cong., 1st Sess. 11 (1959).

not enacted, although the Senate Commerce Committee's rejection of alternative bills which would have modified Section 1(15) apparently caused the Commission to drop its advocacy of an amendment to that section.[21] Continued and heightened freight car shortages and dogged persistence by the Commission finally brought amending legislation in 1966.[22]

Having struggled for almost 20 years to gain authority to impose IPD, the Commission in 1967 reversed course and refused to promulgate IPD regulations because it found no evidence that any freight cars were in short supply. *Incentive Per Diem Charges*, 332 ICC 11 (1967). After a dressing down by the Senate Subcommittee on Surface Transportation,[23] the Commission reversed itself again and imposed IPD on general-purpose, unequipped boxcars ("XM boxcars"). Under the scheme adopted, IPD rates vary according to the original cost and the age of cars used by a non-owner. 49 C.F.R. § 1036.1 (1976). IPD credit balances net of taxes and payments to other roads must be segregated by each carrier in separate financial and bank accounts. *Id.* § 1036.3. These funds are then earmarked for purchase of freight car equipment of the types to which IPD applies. *Id.* § 1063.4. If the funds are not expended within 18 months, they may be "voluntarily surrendered" to the cooperative American Rail Boxcar Company for use in equipment acquisition. *Id.* It is not clear what happens to funds which are neither

21. The Senate took the position that the measures proposed under § 1(15) were too punitive, and it therefore rejected that approach in favor of the incentive approach. *See* S. REP. No. 452, *supra* note 20, at 6-7. In the first ICC Annual Report following this Senate action, the legislative recommendation to amend § 1(15) was dropped without comment. *See* ICC, SEVENTY-FOURTH ANNUAL REPORT 183-184 (1960).

22. Pub. L. No. 89-430, 89th Cong., 2d Sess. § 1, 80 STAT. 168 (1966).

23. *See United States v. Florida East Coast R. Co.*, *supra* note 3, 410 U.S. at 232-233.

spent nor "voluntarily surrendered" for investment in the car fleet. At the present time, IPD is imposed on XM boxcars only during six fall and winter months when boxcar shortages are the most acute.[24]

II. THE DECISION TO IMPOSE IPD ON XF BOXCARS

The Commission decision reviewed here originated in response to a petition filed by General Mills, Inc. (GMI) in one phase of the continuing XM boxcar proceeding. GMI alleged that owners of boxcars designated XP and XF were reclassifying these cars as XM boxcars in order to take advantage of the increased returns made possible by IPD on the XM cars.[25] *See generally Incentive Per Diem Charges–1968*, 349 ICC 303, 306 (1975); comments of GMI, JA 29. As a result, GMI, which uses XP and XF boxcars to transport its considerable shipments of processed foodstuffs, feared that this rolling stock would become contaminated with insects or rodents or that it would be supplied XM cars, many of which were already infested with insects or rodents. In either case GMI would be forced to undertake extensive cleaning operations before infested cars could be used to transport foodstuffs and might have to use pesticides to control contamination. Because pesticide use would have adverse environmental consequences, GMI alleged, the Commission had no choice other than to include XP and XF cars in the IPD system or to file an environmental impact statement. Rather than deciding this issue in the context of the XM proceeding,

24. *See Incentive Per Diem Charges–1968*, 350 ICC 464 (1975).

25. The record does not support GMI's allegation, however. Although other participants before the Commission made allegations similar to that of GMI, no proponent of this view supplied any data to support its position. The only data in the record shows that XF car stocks increased throughout the period when IPD was applied to XM cars. *See* comments of Erie Lackawanna Railroad, JA 20-21 (317 cars upgraded to XF status during this period); comments of Union Pacific Railroad, JA 104 (96 cars upgraded to XF status during this period).

the Commission instituted an additional rulemaking proceeding which culminated in a report, *Incentive Per Diem Charges—1968 (XF Cars)*, 350 ICC 11 (1975) (hereinafter *XF Report*), which concluded that XF cars were in short supply and that they should be included within the existing IPD scheme.

The XF car designation was introduced in 1973. It indicates that a boxcar is equipped with a white epoxy inner coating and that it can only be used by shippers of non-contaminating food products. *See XF Report, supra,* 350 ICC at 13. The XF designation was intended to replace the XP designation, which had been applied to plain, unequipped boxcars used by both the food and automobile industries and generally not equipped with the epoxy lining. *Id.* In either case the designation indicates a high quality boxcar which, under applicable car service rules, cannot be used for carriage of contaminating cargoes. *Id.* At oral argument we were advised that conversion of an XP or XF car to the XM designation requires no physical modification of the car at all, but involves only repainting the identifying numbers on the side of the car and some associated paperwork.

According to the Commission, only the XF car can adequately protect the sanitation of processed package foods. *XF Report, supra,* 350 ICC at 18-19. It appears that the epoxy inner lining of the XF car prevents any rodents or insects which might be nesting between the outer and inner walls of the boxcar from gaining access to the food inside the car. As a result in-transit contamination of food shipped in containers which rodents or insects might otherwise penetrate is reduced or eliminated altogether. By contrast, the "class A" XM car traditionally used for carriage of processed packaged foods has clear disadvantages. *See id.*, at 18. This car is no more than a regular XM boxcar to which the "class A" designation is attached once it has been cleaned and inspected to eliminate unsanitary conditions. In practice,

the visual inspection upon which class A status is based is said to be inadequate because such an inspection will not detect infestation between the walls of an XM car and because the quality of visual inspections varies widely from inspector to inspector. In addition, because XM cars are free-running, *i.e.*, they may be used by any shipper regardless of the type of freight it proposes to load, it is possible that contaminants will be introduced which are not detectable by visual inspection but which can nonetheless taint subsequent loads of processed foods.

Given its conclusion that only XF boxcars are suitable for transportation of processed food products, the Commission takes the further position that the existence of a shortage of XF cars "is amply demonstrated by the prevalent use of the so-called class 'A' boxcars in transporting shipments of food products." *Id.*

It is this further conclusion that is challenged by Conrail, primarily because the Commission has not cited even one instance where a food shipper has asked for, but has not received, an XF car, and because there is no such instance reported in the comments in this proceeding. Conrail also challenges what it perceives to be an inconsistency between the standard of proof of shortages required by the Commission in other incentive per diem cases and the sparse record in this proceeding. The majority has rejected both of these contentions, as do I.[26]

26. I agree with the majority that, were we to hold today that IPD could not be imposed except on a record of shipper complaints, important interests such as that in sanitary food would be put at risk since there is no reason to suppose that the interests of shippers and of the public will necessarily coincide. However, I find it at least troubling, as the majority apparently does not, that the record here is completely devoid of evidence of shipper complaints since the moving parties in this proceeding have been GMI and the Grocery Manufacturers' Association, both groups which would be in a position to know of shipper complaints.

I agree with Conrail that the Commission has departed from contemporaneously announced standards of proof with respect to statistical evidence of car shortages. *See, e.g., Incentive Per Diem Charges—1968*, 349 ICC 303, 311 (1975); *Incentive Per Diem*

However, I agree with Conrail that at most the record evidence supports the need for Commission regulations dealing with car cleaning and loading of contaminating products. I turn to this first before setting out my broader objections to the Commission's overall statutory authority to proceed as it has here.

III. The Adequacy of the Commission's Shortage Finding

The Commission's position can be summarized as follows: (1) there are approximately 760,000 carloads of processed food shipped yearly;[27] (2) a single car can make about 15 to 18 trips per year;[28] (3) consequently there is a need for some 40,000 to 50,00 cars suitable for food shipment; (4) only the XF car is suitable for food transportation; (5) therefore, there is a need for some 40,000 to 50,000 XF cars *versus* a supply of under 3,000 (or of under 35,000 if XP cars are included);[29] hence,

26. (Cont'd.)

Charges—Gondolas, 40 Fed. Reg. 44851, 44851-44852 (1975). This departure is not unexplained, however. The Commission has stated that creation of the XF car classification only one year before its inquiry into imposition of IPD prevented creation of an elaborate statistical record of shortages. *Incentive Per Diem Charges—1968 (XF Cars)*, 350 ICC 11, 17 (1975) (hereinafter *XF Report*). Conrail does not appear to challenge this statement and has cited no authority which would require the Commission to defer action on IPD until adequate statistics can be generated. Therefore, it appears that the Commission was acting within its permitted discretion when it chose to examine the shortage question on the basis of whatever record could be generated given the relative newness of the XF classification.

27. Comments of GMI, Exhibit 17, at 9, JA 68 (verified statement of Daniel G. McPherson, GMI vice-president).

28. *Id.*, Exhibit 16, at 9, JA 53 (verified statement of William K. Smith, GMI vice-president for transportation).

29. XP cars were used for food transportation prior to creation of the XF designation. *See* p. A48 *supra*. At the time of the Commission's report there were 2,495 XF cars and 29,075 XP cars. *XF Report*, *supra* note 26, 350 ICC at 17.

(6) the statutory shortage requirement is met.[30] In my judgment, the fourth step of the Commission's analysis cannot be sustained on the record it has made in this proceeding.

Initially, it is interesting to note that William K. Smith, GMI's vice-president for transportation and the moving party in these proceedings, stated, contrary to the Commission's conclusion, that GMI uses successfully DF, DFB, and *XM* cars.[31] To be sure, all of GMI's cars are in assigned service[32] and this may account for its ability to use cars other than those of XF design. This conces-

30. Conrail has not challenged the figures in text; however, it has challenged the inference which should be drawn from them, noting particularly that William K. Smith, GMI's vice-president for transportation and apparently the person whose testimony launched the XF proceeding, did not conclude from these figures that IPD was needed on XF cars except to prevent reclassification of XF cars to XM. Were such reclassifications prevented, GMI would apparently have been satisfied and would not have pressed for IPD simply to increase the size of the XF car fleet. *See* Comments of GMI, JA 35. As has already been noted, *see* note 25 *supra*, there is no evidence that GMI's fears of losing its XF fleet were well founded. To the contrary, the record so far as it shows anything indicates that railroads serving food shippers were ready and able to supply the needed cars. *See* Comments of Grand Trunk Western, JA 6 ("The Grand Trunk Western Railroad Company plans to expand the use of 'XF' box cars for use by the cereal industries over our lines."); Comments of Erie Lackawanna, JA 20-21 ("This company knows of no facts which would lead us to the conclusion that there is a national shortage of XF cars. • • • Erie Lackawanna has upgraded some 317 box cars between December 1973 and August 1974 at great expense to create the status of an XF car • • •."); Comments of Union Pacific, JA 104 ("Union Pacific, when approached by food processing companies, has satisfied all specific requests for the provision of [XF] cars."); Comments of Florida East Coast, JA 127 ("[A] survey during the month of July 1974 shows that FEC had a surplus of XF cars on line.").

31. Comments of GMI, Exhibit 16, at 7, JA 51. The Commission reported that GMI also used XL cars. *Environmental Threshold Assessment Survey*, JA 155.

32. In assigned service, cars are restricted as to the use terminating roads may make of them. Assigned service is discussed at length below. *See* text at notes 41-52 *infra*.

sion only highlights a further difficulty with the Commission's argument, however. Stated precisely, the Commission's proposition four is that "the function of XF cars cannot, *under present car service rules,* be adequately performed by other cars available for the transportation of food shipments." *XF Report, supra,* 350 ICC at 10 (emphasis added). The italicized phrase in this proposition is critical. As the Commission clearly recognized, existing car service rules allow continual reintroduction of contaminants into class A XM boxcars. Thus it is scarcely surprising that XM cars, regardless of car design, are given to food shippers in less than desirable condition. Indeed, unless XF cars can be assigned to non-contaminating uses, the Commission found that they too would have to be fumigated and decontaminated notwithstanding their white epoxy coating. *Id.* at 15. This illustrates a key fact about XF cars. They are desirable because they can be assigned to a restricted service in which the "primary source of contamination, *i.e.,* grain and related products and other unsanitary bulk commodities, [is] banned * * *." *Id.* at 19.

The record further suggests that there is nothing inherently unsanitary about the XM car. The problem with these cars arises only after rodents and insects infest their inner walls. All parties agree that such infestation is not present in the car at the beginning of its life, but is caused by introduction of bulk feeds, grains, and similar loose, life-supporting products into the XM car. *See XF Report, supra,* 350 ICC at 13; ICC *Environmental Threshold Assessment Survey,* JA 156, 162; comments of GMI, Exhibit 16, at 10, JA 54 (testimony of Mr. Smith). *See also* br. for the United States at 8. Indeed, it appears that the XP boxcar, which unlike the XF did not initially have an epoxy coating and was therefore substantially identical to an XM car, was successfully used by processed food shippers in assigned service for a number of years prior to creation of the XF designation. *See XF Report, supra,* 350 ICC at 13;

comments of GMI, Exhibit 17, at 4, JA 63; comments of General Foods Corp., JA 146. The success of the XP car as a sanitary vehicle is apparently due not to its intrinsic design, therefore, but only to the fact that its restriction to assigned service prevents introduction, or repeated reintroduction, of contaminating cargoes into the car.

The record in this proceeding thus strongly indicates that the scarcity of sanitary cars is due to the absence of a classification for food-quality boxcars of whatever design which would allow their assignment and control in a manner like that established for XF cars by Association of American Railroads Car Service Directive 155.[33] The presence or absence of a white epoxy lining, on the record here, is beside the point. Accordingly, the actual regulatory problem faced by the Commission is a false scarcity of food-quality cars created by car service rules which allow continual reintroduction of contaminants into cars cleaned for food service.

There can be no doubt that the Commission recognized the crucial interplay between sanitation and car service rules, for it reversed its initial proposal to put XF cars in general service [34] once it became aware that such use would defeat the whole XF car program. Apparently the Commission, determined to go forward with IPD, never did become aware that the record before it indicated that XM cars could similarly be made suitable for food transportation through reclassification to a restricted service. If it had become aware of this, it might have exercised its undoubted authority [35] to create an assigned service for high quality XM cars. Had it done so, there would likely be no scarcity of sanitary vehicles requiring the corrective powers of IPD.

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33. *See* note 41 *infra.*

34. *See Notice of Proposed Rulemaking and Order,* JA 2.

35. *See, e.g., United States v. Allegheny-Ludlum Steel Corp., supra* note 3.

Given this state of facts, I think the Commission has failed to give adequate consideration to all relevant factors and has further stopped short of giving the record the hard look essential to an exercise of informed discretion. Accordingly, I would vacate the rules imposing IPD on XF cars. By this, I do not mean to imply that the Commission must modify car service rules before it can apply IPD. The Commission plainly enjoys discretion to proceed by promulgation of rules, imposition of IPD, or a combination of approaches. It may not, however, impose IPD because a scarcity of a particular type of car has been generated primarily by the very car service rules which the Commission is empowered to change until it has at least considered whether a seemingly simple car service rule modification would alleviate the shortage.

IV. Statutory Authority to Impose IPD

As indicated above, the Commission has in my judgment failed to make out a case for imposition of IPD on XF cars even assuming its proffered syllogism adequately implements the statutory scarcity requirement. My primary objection to what the Commission has done here goes beyond this, however, for it seems to me that the Commission has stepped beyond the bounds of its authority under Section 1(14)(a) of the Act.

Section 1(14)(a) as amended in 1966 allows IPD to be imposed only if the Commission finds *both* that a shortage of a particular type of car exists and that incentive elements are necessary to "provide just and reasonable compensation to freight car owners, contribute to sound car service practices * * *, and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce * * *."[36] It is easy to understand how all of the latter objectives would be met if the national

36. *See* note 6 *supra*. The language quoted in text was not changed by the 1976 amendments to § 1(14)(a). *See* Pub. L. No. 94-210, § 212(a), 90 Stat. 47 (1976).

car-pool system were malfunctioning as described in Part I *supra*. Any increase in per diem would presumably provide an incentive to railroads to return foreign cars which they were not using and would thereby "contribute to sound car service practices."[37] Such an effect is inherent in any time charge, whether for railroad cars, library books, or bulldozers. In addition, because incentive per diem is by definition an increment above basic per diem—the "expense involved in owning and maintaining [any given] type of freight car, *including a fair return on value*," 49 U.S.C. § 1(14)(a) (emphasis added)—over the long run it would be advantageous to users of foreign cars to build cars of their own so that, by incurring ownership costs roughly equal to basic per diem,[38] they might avoid the higher sum of basic per diem and incentive per diem.

Given the definition of basic per diem in Section 1(14)(a) to include a fair return on value, it also becomes clear that the "just and reasonable compensation to freight car owners" for which IPD can be instituted must be something other than "fair return" on money invested. That something else, according to the Commission, is a return to compensate "for the earning power or the value of the use of the vehicle which is lost by the owner when [a car is] used or appropriated by other carriers." ICC, Seventy-

37. At some point, however, more rapid return of cars could be achieved only by returning an excessive number of empty cars, which would be extremely inefficient. *See Hearings*, *supra* note 11, at 33 (statement of ICC Chairman Webb); note 17 *supra*.

38. *See Per Diem Report*, *supra* note 7, 332 ICC at 186. The 1976 amendment to § 1(14)(a) states the standard for setting basic per diem slightly differently, *viz.* "fair return on the cost of such type of freight car (giving due consideration to current costs of capital, repairs, materials, parts, and labor)." Pub. L. No. 94-210, § 212(a), 90 Stat. 47 (1976). This standard does not appear to differ in practical effect from the earlier standard as applied in the *Per Diem Report*, *supra*. In any case, at the present time, basic per diem rates continue at levels established with reference to the language of § 1(14)(a) adopted in 1966.

FIRST ANNUAL REPORT, *supra*, at 137.[39] Because the average daily revenue which accrues to a car in use is well above basic per diem,[40] the owner who cannot use his car and who, because of nationwide shortages, has no other cars on-line to put into revenue service loses more net revenue than he gains by receiving basic per diem. Thus when a non-owning road, "by hook or by crook, arrange[s] to utilize cars owned by other roads," *United States v. Allegheny-Ludlum Steel Corp., supra*, 406 U.S. at 745, it appropriates to itself incremental revenue which in fairness belongs to the car's owner.

The legislative history of the 1966 amendment to Section 1(14)(a) confirms that the "fit" of the amendment to the regulatory problem described in Part I is no coincidence and that the statutory inadequacy of supply requirement can best be understood as shorthand for congressional concern that IPD not be imposed except where the Commission has found that the disincentives associated with the national car-pool system have contributed to creation of an inadequate supply of a particular type of car. Indeed, the legislative history of the 1966 amendment shows rather clearly that in Congress' view the primary reason for the shortage which IPD was to correct was the widespread use of foreign cars, especially by eastern railroads. Thus to Senator Magnuson, sponsor in the Senate of the bill which became the 1966 amendment,

> [t]he shortage [which the amendment was intended to correct] results from the fact that many western roads build sufficient cars, but the trouble is that when the cars are on eastern roads, in the course of delivering goods to eastern markets, there is a reluctance on the part of some railroads in the East to return the cars . . . . . .
>
> . . .
>
> Some railroads find it more desirable to keep the boxcars and pay the $3 or $4 rental—at one time it was less than $2—than to buy boxcars. It is less costly to rent cars than to build them.

111 CONG. REC. 15375 (1965). *See also* S. REP. No. 386, 89th Cong., 1st Sess. 3 (1965); S. REP. No. 452, 86th Cong., 1st Sess. 4-5 (1959). As similar understanding of the problem was echoed in the House. *See, e.g.*, 112 CONG. REC. 10437 (1966) (remarks of Rep. Mize) ("when the per diem charge is low, as it is now, it is cheaper to rent a car than it is to buy or build one"); *id.* at 10438-10439 (remarks of Rep. Adams) ("[o]bviously it has been cheaper for many railroads to simply take the new cars produced by other railroads and hold them on their lines and pay a minimal rental rather than produce new cars"). *See also Hearings on H.R. 2230, H.R. 7165, and S. 1098 Before the House Committee on Interstate and Foreign Commerce*, 89th Cong., 1st Sess. 20, 30, 32-33, 39 (1965) (remarks of sponsors of legislation to amend § 1(14)(a)).

Notwithstanding the focus of the 1966 amendment, the Commission has chosen here to apply IPD to a type of freight car which has never been part of the national pool of free-running boxcars. Instead, use and return of XF cars had been governed until the order in this proceeding by Association of American Railroads Car Service Directive 155[41] under which XF cars could be, and apparently often

39. *See* note 56 *infra*.

40. *Hearings on H.R. 2230, H.R. 7165, and S. 1098 Before the House Committee on Interstate and Foreign Commerce*, 89th Cong., 1st Sess. 91 (1965) (testimony of general counsel for Burlington Lines).

41. Car Service Directive 155 provides in relevant part:

NOTICE:

> This Directive is issued under provisions of paragraph (g), Car Hire Rule 19. Each violation of Section A.2., or Section B.2. of this Directive is subject to an assessment of one hundred dollars ($100.00).

were,[42] assigned to a single shipper for its individual and

41. (Cont'd.)

APPLICATION:

To box cars AAR mechanical designation XF, carrying railroad reporting marks.

ORDER:

SECTION A. Cars Assigned to Shipper or Pool Points.

1. Waybills accompanying assigned cars under load must be endorsed "Assigned Car For Processed Packaged Food Loading CSD No. 155."
2. After unloading, such cars must be returned empty to assigned loading point via reverse of loaded movement.
3. Such empty return must be on standard form waybills without charges which shall be endorsed "Assigned Car For Processed Packaged Food Loading CSD No. 155."

SECTION B. Unassigned Cars.

1. Waybills accompanying unassigned cars under load must be endorsed "Unassigned Car For Processed Packaged Food Loading CSD No. 155."
2. After unloading, cars subject to this Directive must be handled either per owner's instructions or returned empty to the owner or loaded to or via the owner, the holding road to exercise the option.

SECTION C.

XF cars are restricted to processed packaged food loading only except, with the approval of owner, such cars may be used for loading other non-contaminating products enclosed in clean packaging. Cars must not be used for the loading of bulk commodities. If cars are used for loading which results in contamination or damage to linings or floors, and it becomes necessary to renew floors, lining or sheathing (including any associated parts), or portions thereof, in order to restore cars to previous loading classification, the cost of repairs shall be assumed by the road (either switching or road haul) placing cars for loading.

NOTE: Carriers may exempt their cars from the provisions of Section A. 2. or B. 2. to allow use by other specified lines for loading as prescribed in Section C. Such exemptions must be confirmed in writing to the Car Service Division in advance.

42. The record does not indicate how many XF cars have been placed in assigned service and how many in unassigned service.

exclusive use.[43] Once assigned, XF cars could not be used by connecting lines for any purpose other than completion of a through haul unless the shipper-assignee directed the car to be loaded on the connecting line.[44] In all other cases, Directive 155 plainly required that "[a]fter unloading, such cars must be returned empty to [the] assigned loading point via reverse of loaded movement."[45] There is no evidence in the record that this particular car service directive has been abused.[46] To the contrary, GMI com-

42. (Cont'd.)

The comments of many parties indicating that assignment was critical to the effectiveness of the XF car as a food carrier would indicate that few if any XF cars ever operated in unassigned service. *See XF Report, supra* note 26, 350 ICC at 15. The Commission also states that XF cars are operated in assigned service and does not even mention the possibility that they might be free-running. *Id.* at 13.

43. Even if XF cars have been operated in unassigned service, Directive 155, § B(2), allows the owner of an XF car to specify how it will be moved after unloading. *See* note 41 *supra.* The only evidence in the record suggests that an owner's directions for further movement have generally been followed and that carriers and shippers have been cooperating to ensure proper car use. *See* comments of GMI, Exhibit 16, at 9, JA 53.

44. *See* Directive 155, § A(2), *supra* note 41. The "NOTE to Directive 155 allows carriers to direct that their cars be loaded on foreign lines. *See* note 41 *supra.* Some roads have apparently made use of this provision to allow shipper-assignees to make loaded return movements. *See* comments of General Foods Corp., JA 146-147.

45. *See* note 41 *supra.*

46. Although Congress required the Commission to find that cars were in inadequate supply before IPD could be imposed, the finding of a car shortage does not itself indicate anything about the reasons for the shortage. And, while it is clear that Congress was legislating against an assumed state of facts in which car shortages could in some cases be ascribed to disincentives to car ownership caused by abuse of car service rules, the legislative history is quite plain that no one thought that car shortages necessarily implied an abuse of car service rules or that such an abuse was the sole cause of car shortages. The House report summarized the situation as follows:

> There have been all sorts of conflicting statements made as to the reasons for the shortages as to whether they arise

mented that its assigned car program had been a success in part because of its ability in practice to direct the movements of each car assigned to it.[47] Moreover, the crux of the Commission's scarcity analysis is that roads without XF cars are supplying *XM* cars, not foreign XF cars, to food shippers.[48] Thus any shortages of XF cars cannot, on the record here, be attributed to roads using foreign XF cars to meet the needs of their shippers.[49] In addition, there is no evidence in the record to indicate that XF cars are not returned promptly to their assigned points of origination. Again, the comments suggest that the reverse

46. (Cont'd.)
from lack of adequate ownership, or from improper distribution of the existing car fleet, or from overdetention by the shippers in unloading, or from the prevailing 5-day as against the 6-day week • • •.

• • • •

The record of the hearings which have been had on this bill is similar to the records which have been had on previous bills and is not conclusive as to whether "incentive" per diem will be successful in achieving the goal which we are seeking, namely, the alleviation of these chronic shortages.

Therefore, inasmuch as some railroads feel that this might be of great help to the situation and inasmuch as the Interstate Commerce Commission is of the belief that with this authorization it can do something in the matter and inasmuch as no alternative has been brought to the attention of the committee, the committee is recommending that this bill be enacted.

H.R. REP. No. 1183, 89th Cong., 1st Sess. 2-3 (1965). The Commission has also required proof of the existence of disincentives to car ownership arising from car service practices. *See* text at notes 59-60 *infra*.

47. *See* comments of GMI, Exhibit 16, at 9, JA 53.

48. *XF Report*, *supra* note 26, 350 ICC at 18.

49. Inadequacies in XF car supply may be attributable to low tariffs on processed food products. *See* comments on behalf of the Trustees of Penn Central Transportation Co., JA 92:

Penn Central • • • has no present intention of acquiring or assigning any additional cars to the XF classification. The primary reason is that the present rate structure • • • is wholly unsatisfactory from a net revenue standpoint. • • •

is true since the two shipper-assignees who made statements both indicated that their XF cars made more revenue trips per year than the national average for freight cars and neither mentioned any dissatisfaction with the achieved rate of XF utilization.[50]

The modification of Directive 155 required by the order here under review, *see XF Report*, *supra*, 350 ICC at 19, does not change the foregoing conclusions materially. The *XF Report* prohibits assignment of cars to a single shipper, but continues to allow assignment to a single location—which can presumably be a location on the owning railroad's line—for use in originating shipments on the owner's line. *See id.* Thus, for example, Grand Trunk Western Railroad now assigns all its cars to Battle Creek, Michigan, a location convenient to a number of its major food shippers,[51] and is apparently allowed to continue this practice under Directive 155 as modified.[52]

The record before us does not, therefore, support the conclusion that the disincentives to car ownership associated with the national boxcar pool have affected the supply of XF cars. This raises the question whether the broad language of the 1966 amendment nonetheless allows imposition of IPD on XF cars even though the existence of the core problem to which Congress addressed the 1966 amendment has not been established. I think it does not, although the conclusion is not free from difficulty given the blunderbuss nature of IPD[53] and the fact that imposition of IPD under the present regulations might result in more XF cars being built.[54]

50. *See* comments of GMI, Exhibit 16, at 9, JA 53; comments of General Foods Corp., JA 146.

51. Comments of Grand Trunk Western Railroad, JA 6.

52. "[The amendments of Directive 155] will preserve to the railroads full control of their cars." *XF Report*, *supra* note 26, 350 ICC at 19.

53. *See* note 17 *supra*.

54. This could occur in either of two ways. First, the earmarking requirements set out in 49 C.F.R. § 1036.3 (1976) will

Initially, it is important to note that there is no evidence that XF cars are being "appropriated" by non-owning lines for their own use or are being allowed to stand idle and consequently IPD on XF cars is in essence a tax on the function of terminating through hauls. Although Congress clearly appreciated that IPD would accrue while this function was performed, the legislative history of the 1966 amendment to Section 1(14)(a) indicates that no assessment of IPD was to be made on the termination function except where this was incidental to the mechanics of imposing IPD on improper uses of foreign cars.

The Commission chairman testified before Congress that it was not the Commission's position that net per diem debtors should be taxed as such because at least some debtors would be short lines, or terminating or bridge roads, which ought properly to be using foreign cars to minimize inefficient unloaded car movements.[55]

54. (Cont'd.)
require any net IPD balances on XF cars to be used for new car construction, although not necessarily for construction of XF cars, *see id.* § 1036.4. Second, under § 1036.4, funds which are earmarked can be used to construct any of the types of cars to which IPD applies. Thus it is conceivable that funds arising from XM car use could be applied to XF car construction (and vice versa). This use of funds raises problems, however. In *Incentive Per Diem Charges—1968, supra* note 26, the Commission stated:

> [T]he main benefit from investing incentive per diem funds in an expanded covered hopper fleet would accrue to the grain shippers. This is contrary to the broader basis specified in section 1(14)(a) of the act for imposition of incentive per diem, namely consideration of "factors affecting the adequacy of the national freight car supply". Therefore, we believe that *incentive funds should only be used for purchase of plain boxcars, in order to benefit shippers generally and not a particular segment of the shipping public.*

349 ICC at 311 (emphasis added). How XF cars—which are restricted to food shippers, a class undoubtedly no larger than grain shippers—would "benefit shippers generally" if covered hoppers do not is by no means apparent.

55. *See Hearings, supra* note 11, at 12, 14, 35.

Not willing to take the chairman's word that the Commission would examine the effect of IPD on such lines and make exemptions where appropriate, the Senate Commerce Committee amended the Commission's proposed bill to require the Commission to consider the need to exempt "carriers * * * owning an adequate number of freight cars to meet their responsibilities [and] carriers terminating a substantially higher percentage of interline traffic than they originate * * *," S. REP. No. 386, *supra*, at 2, 5, from IPD requirements. Although this language was removed by the House, *see* H.R. REP. No. 1183, 89th Cong., 1st Sess. 1 (1965), this deletion was not intended to work any substantive change in the factors the Commission was to consider. As explained by Senator Cotton during debate on the motion to concur in the House amendment:

> Under the Senate version of the bill, the ICC was specifically empowered to exempt from the incentive, or penalty, element of the freight car charges any or all of the groups [expressly enumerated in the Senate bill].
>
> The aim of these provisions of the Senate bill, which I had a part in suggesting, was to assure reasonable and fair consideration of the special problems arising in the industry, *including the problem of the terminating railroads, whose per diem charges are not related to the number of boxcars they may own.*
>
> In the bill before us today, as it has come back from the House of Representatives, the four types of circumstances spelled out in the Senate bill are not directly listed. *It is clear, however, that all the factors listed in the Senate bill still have to be considered by the * * * Commission,* and the Commission would have the power, and the duty, not to apply the incentive element to any group of carriers, and even a single carrier, where those four circumstances, or any other circumstances, made it in the national interest to do so.

112 CONG. REC. 10756 (1966) (emphasis added). Senator Cotton's understanding of the effect of the House amendment seems clearly correct since the same view was taken by Representative Staggers, House floor manager for the bill:

> [T]he committee amendment provides that the Commission would be empowered in its discretion to exempt from the incentive element provisions any group of carriers where the Commission finds such exemption to be in the national interest. This provision enables the Commission to make exemptions from paying an incentive element by class of carrier, and permits the Commission to consider the several factors specifically authorized in the Senate bill.

112 CONG. REC. 10435 (1966).

The conclusion that IPD was not to be applied except where there was some evidence that the breakdown of the national car-pool system had contributed to car shortages is further buttressed by a consideration of the meaning of the phrase "just and reasonable compensation" used in the 1966 amendment to describe IPD payments, The reason the Commission adopted IPD rather than a simple penalty to be paid to the United States appears to be that car owners were losing revenue in times of shortage because their cars were being "appropriated" by non-owners and because no foreign cars were available on the owners' lines to take the place of cars lost to non-owners.[56]

56. The Commission's theory is nowhere spelled out with detail or clarity. In its Seventy-First Annual Report, in which promulgation of a rule under § 1(14)(a) was first endorsed, the Commission stated:

> The two principal causes of shortages are inadequate car ownership and the failure of some carriers to utilize existing equipment efficiently. One way of correcting this unsatisfactory situation is the imposition of a penalty per diem charge [under § 1(15)] which would furnish a pecuniary spur to deficit railroads to acquire enough cars to meet their own loading obligations. Another approach to the problem * * * is the requirement that the earning power or the value of the use of the vehicle which is lost by the owner when used or appropriated by other carriers, be included as a factor by the Commission in determining the per diem charge. This would eliminate the owner's loss, the user's gain, and provide an incentive for increased car ownership.

ICC, SEVENTY-FIRST ANNUAL REPORT 137 (1957). The language of the bill proposed by the Commission closely parallels this explanation, *see* S. REP. No. 386, 89th Cong., 1st Sess. 2 (1965), and ICC Chairman Webb appeared to endorse this explanation of the phrase "just and reasonable compensation" when he testified:

> [T]he bill [would] raise the per diem charge so as to *return* some profit to the owner of the car and thereby encourage an increase in car supply.

Hearings, supra note 11, at 35 (emphasis added). The "use value" or the profit to be "returned" would apparently be a value proportional to the net revenue which the non-owning user had gained through "appropriation" of a foreign car. An extended explanation of the function of per diem given by the general counsel of Burlington Lines, the major proponent of IPD, corroborates this view. *See generally Hearings, supra* note 11, at 140-142; *Hearings, supra* note 40, at 91. Presumably any level of per diem above basic per diem would provide incentives to chronic borrower roads to buy cars since, with ownership costs approximately equal to basic per diem, more net revenue would be returned if an owned car was used wherever possible. The opposite side of this proposition is that creditor roads would have financial incentives to invest more heavily in cars if the debtors did not increase their fleets since the total return to car ownership would be increased. In the XF proceeding, however, while owners of XF cars would undoubtedly enjoy increased returns, there is no evidence that XF debtors are making any revenue through appropriation of XF cars unless the word "appropriation" is tortured to apply to the period in which XF debtors are fulfilling their statutory obligation to terminate XF shipments. Thus the "use value" of which XF owners are deprived is zero, and the incentive per diem should similarly be zero.

The Senate too took the position that the reason for giving compensation above basic per diem was "to provide just compensation to freight car owners by recognizing the value of the use of such equipment * * *." S. REP. No. 386, *supra*, at 4.

Inexplicably, Representative Staggers stated that the House amendment to the Senate bill rejected this concept of use value since it was "essentially * * * an approach to the problem through penalties rather than through incen-

tives." 112 CONG. REC. 10435 (1966). This statement notwithstanding, there is nothing in the legislative history of the House amendment which gives any other credible reason for compensating freight car owners for the use of their cars in time of shortage. This is especially so today when the Commission has set basic per diem rates in accord with the standards set out in Section 1(14)(a) so that the criticism often voiced in the House debate—that the basic per diem did not give a sufficient return on value to the owners of freight cars—can no longer be validly made.[57] Thus, while it is possible that the House meant to confer power on the Commission to increase the financial return to car owners without regard to whether non-owners were using foreign cars improperly, such a construction is unlikely since there is no express statement to this effect in either the House report or the debates on the House bill and since this construction would be inconsistent with the House's retention of the Senate's exemptions for roads which were net per diem debtors and yet which had the correct number of cars.[58]

Finally, the history of the 1976 amendment to Section 1(14)(a) also supports the view that IPD is proper only where railroads are using foreign boxcars in times of shortage. That amendment added a preamble to Section 1(14)(a) which reads: "It is the intent of Congress to encourage the purchase, acquisition, and efficient utilization of freight cars." Pub. L. No. 94-210, 94th Cong., 2d Sess. § 212, 90 STAT. 46-47 (1976). While this language would support a very broad reading of the Commission's authority to impose IPD, the legislative history of this preamble discloses that the concern of Congress was to authorize and encourage a remedy for improper use of foreign freight cars: "The first change [the preamble] provides that the intent of Congress is to encourage ownership of cars *and discourage the use of cars not owned.*" H.R. REP. No. 725, 94th Con., 1st Sess. 73 (1975) (emphasis added).

Further evidence that IPD cannot be imposed except as a corrective for disincentives to freight car ownership associated with the national car-pool system can be found in the Commission's interpretation of the shortage requirement in all other IPD proceedings.[59] The Commission's

57. House members were fond of repeating variants of the phrase "under present per diem rules, it is cheaper to rent a car than to own one." *See, e.g.*, pp. 22-23 *supra*. This apparently referred to a belief that per diem rates were "barebones" rates which did not really cover the costs associated with freight car ownership. While this may or may not have been the case, it seems clear that no amendment to § 1(14)(a) was needed to authorize the Commission to establish reasonable, compensatory per diem rates. *Palmer v. United States, supra* note 15, is not to the contrary since that case treated the issue as whether the Commission had

> power to fix compensation for the use of cars as a regulatory measure, solely for the purpose of increasing efficiency in the use of cars and *at an amount wholly independent of the costs of car ownership, expenses of maintenance and operation, and a reasonable profit.*

75 F.Supp. at 66 (emphasis added). The issue of whether the increase was justifiable as compensation was not before the court. *Id.* at 76. Moreover, Rep. Staggers, in explaining the House amendment, which expressly defined basic per diem to include "a fair return on value," stated that this language was merely a restatement "in clear language of what the courts have held to be the limitations of the law as it is now written." 112 CONG. REC. 10435 (1966). *See also Hearings, supra* note 40, at 52 (testimony of ICC Chairman Webb) ("Oh, we have that authority [to fix a compensatory per diem rate] at the present time, and we have always had it."). If the only purpose of the amendment was to force the Commission to set per diems to include a fair return on value, then the Commission has already done this, *see Per Diem Report, supra* note 7, at 211-214, and any additional increment of compensation for XF car owners would appear *a fortiori* to be excessive.

58. *I.e.*, such roads, by virtue of being net per diem debtors, would routinely be using other roads' cars, thereby depriving them of revenue. If the purpose of IPD was simply to increase the return on car owners' investment, then no such exemption would be required and, indeed, such an exemption would be counterproductive.

59. "The construction of a statute by those charged with its execution" is an important factor to be considered in divining the meaning of a statute. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969). This is especially so here, where the legislation was proposed by the agency charged with its execution and

attempt to impose a system like IPD in 1947 was predicated on evidence that cars were not being properly returned to the lines of their owners. Car shortages, while providing the need to take corrective action, were incidental to the form of regulatory action proposed.[60] The first three Commission IPD reports after the 1966 amendment [61] focused almost exclusively on the question whether there was a nationwide shortage of XM boxcars. However, a contemporaneous Commission Report, *Investigation of Adequacy of Railroad Freight Car Ownership, Car Utilization, Distribution, Rules and Practices,* 335 ICC 264 (1969), demonstrated conclusively that the factors of poor utilization and non-owner use of XM cars existed, *see id.* at 294-295,[62] and accounts for the absence of any Commission discussion of this problem in the IPD reports.

In the first IPD report to discuss in detail the evidence needed to justify imposition of IPD, *Incentive Per Diem Charges–1968,* 349 ICC 303 (1975), issued only months before the XF car rules, the Commission declined to extend IPD to covered hopper cars, stating that the record did not meet the evidentiary standards for imposing IPD which it defined as follows:

> • • • [W]e are amenable to an expansion of the incentive per diem program to cars other than general service boxcars if (1) a record is made showing the car to be in short supply, (2) *a record is made showing a reluctance to expeditiously release the car by the terminating or delivering railroad* • • •.

59. (Cont'd.)

where the legislative history indicates that Congress had no strong views on the efficacy of the approach suggested, but merely wanted to ensure that the *Palmer* case presented no barrier to Commission experimentation. *See* H.R. REP. No. 1183, *supra* note 46, at 2-3.

60. The Commission's initial proposal to amend § 1(15) also indicates that the Commission conceived of IPD as an adjunct to emergency powers intended to get cars moving more quickly in times of short-term emergency.

61. *Incentive Per Diem Charges,* 332 ICC 11 (1967); *Incentive Per Diem Charges–1968,* 337 ICC 183 (1969) (interim report); *id.,* 337 ICC 217 (1970) (further report).

62. The findings of this report were affirmed in *United States v. Allegheny-Ludlum Steel Corp., supra* note 3.

Id. at 311 (emphasis added). This position was reiterated a few months after promulgation of the XF car rules in the Commission's notice of proposed rulemaking in *Incentive Per Diem Charges–Gondolas,* 40 FED. REG. 44851 (1975). There the Commission stated:

> The record should be developed to describe current utilization and distribution practices in order to examine the impact of these practices on gondola car supply. • • •

Id. at 44851.

In summary, with the conclusion of the XF proceeding the Commission has come completely about in its understanding of the uses to which IPD should be put. In 1947 IPD was envisioned as a short-term tool which was presented to the *Palmer* court as a device whose purpose was "wholly independent" of any notion of compensation for car owners.[63] Between 1947 and 1966 short-term changed to long-term and the purely regulatory purpose was given overtones of compensation for use value. Today we are asked by the Commission to approve a use of IPD which cannot be said on the record before us to serve any of the regulatory purposes envisioned for IPD in either 1947, 1966, or 1976. With Section 1(14)(a) stripped of its regulatory heritage, however, it is simply not possible to assume that IPD will "contribute to sound car service practices" [64] and, further, the phrase "just and reasonable compensation" loses the only apparent meaning Congress ever intended it to

63. *See Palmer v. United States, supra* note 15, 75 F.Supp. at 66.

64. *See* notes 17 & 27 *supra.*

have. Accordingly, I would vacate the Commission's orders.[65] *See* 5 U.S.C. §§ 706(2)(A), 706(2)(C) (1970). Moreover, even if my understanding of Section 1(14)(a) is mistaken, the Commission has at the very least departed without explanation from its contemporaneously announced standard of proof and for this reason as well should be reversed. *See Greyhound Corp. v. ICC*, — F.2d —, — (D.C. Cir. No. 75-2062, decided Jan. 21, 1977) (slip op. at 3-4).

V. Conclusion

Nobody wants rats or insects in their breakfast cereal, and if the choice here were between rats or financial hardship on Conrail, I would take a stand with the majority. But this is not the choice. For all that is shown on the record of this rulemaking, sanitation could be costlessly achieved simply by Commission promulgation of rules allowing clean XM cars to be retained in an assigned service free from the continual loading of contaminants. Yet the Commission seems oblivious to this possibility, even though its availability is strongly indicated by the record. Equally important, the Commission has not demonstrated that it has the authority to impose IPD on XF cars, although I believe it does have the authority to create an XF car fleet under other parts of the Interstate Commerce Act. Because of this, I would not allow the Commission to create a broad taxing power where it is clear that none was intended by Congress. Since the majority opinion does not require the Commission to take a hard look at the record and because the majority concurs in what is in my view an unsound read-

65. Commission counsel apparently does not disagree with the legislative history adumbrated above, since he explains that § 1(14)(a) is a response to shortages "largely attributable to the national car-pool system." ICC br. at 3. Nonetheless, counsel does not point to any evidence in the administrative record which would indicate that the disincentives to ownership present in the car-pool system have affected the supply of XF cars.

ing of the incentive per diem amendments, I respectfully dissent.[66]

66. In my judgment, the procedures adopted by the Commission in this proceeding are seriously deficient and contrary to both the hearing requirement of § 1(14)(a) of the Interstate Commerce Act and the common law of this circuit. The Commission's notice of proposed rulemaking failed to disclose the data upon which it was based and, when this material was sought by Conrail, the Commission apparently refused to supply it. In addition, the Commission in unexplained haste refused to allow reply comments. With regard to the failure to disclose the information upon which the Commission's action was based, it is sufficient to note that the law of this circuit is well-settled: an agency has an obligation to disclose data underlying its positions to the public for scrutiny and comment. *See, e.g., Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 392-394 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 649 (D.C. Cir. 1973). The issue of the necessity of reply comments is somewhat clouded. A three-judge District Court has taken the position that, since reply comments are not expressly required by 5 U.S.C. § 553, there is no obligation on the Commission to allow them. *See Ann Arbor R. Co. v. United States, supra* note 3, 368 F.Supp. at 111. I disagree. In *United States v. Florida East Coast R. Co., supra* note 3, the Supreme Court held that the "hearing" requirement of § 1(14)(a) was not the adjudicatory hearing of 5 U.S.C. §§ 556-557. Nonetheless, the Court left open the possibility that the "hearing" requirement might call for supplementation of the procedures set out in § 553. *See* 410 U.S. at 238. Certainly the commonsense notion of a hearing encompasses "a reasonable opportunity to know the claims of the opposing party *and to meet them* • • •" *Morgan v. United States*, 304 U.S. 1, 19 (1938) (emphasis added), whether those claims are made by the Commission, as in *Florida East Coast*, or primarily by private petitioners, as here. Especially on the issue of adequacy of supply, upon which Congress mandated a *finding*, something more than a "boxcars passing in the night" procedure would seem to be required.

I am not sure whether the procedural errors I perceive in this proceeding require reversal in the special circumstances of this case, since the parties have expressly waived all procedural objections and consequently have not focused on the actual harm which may have resulted from these deficiencies. However, I think the Commission should be aware that procedures in rulemaking are for the benefit of the public as well as the parties and accordingly cannot be shielded from appellate review by waiver. Therefore, should a proceeding marred with similar errors come before this court in the future, I would not be hesitant to reverse the Commission.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 75-2089 September Term, 1976

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Consolidated Rail Corporation,
Petitioner

v.

United States of America and
Interstate Commerce Commission,
Respondents

—

Grocery Manufacturers of America, Inc.
Illinois Central Gulf Railroad Company
Chicago, Rock Island and Pacific Railroad Co.
Florida East Coast Railway Company
Chicago and North Western Transportation Co., et al.

—

BEFORE: WRIGHT and ROBB, Circuit Judges; GESELL,*
U. S. District Judge for the District of Columbia

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Order

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Upon consideration of the petition for rehearing filed by petitioner and intervening railroads, it is

* Sitting by designation pursuant to 28 U. S. C. § 292(a).

ORDERED by the Court that the aforesaid petition for rehearing is denied.

Per Curiam
For the Court:
GEORGE A. FISHER
Clerk

Filed April 22, 1977

Circuit Judge Wright would grant the instant petition.